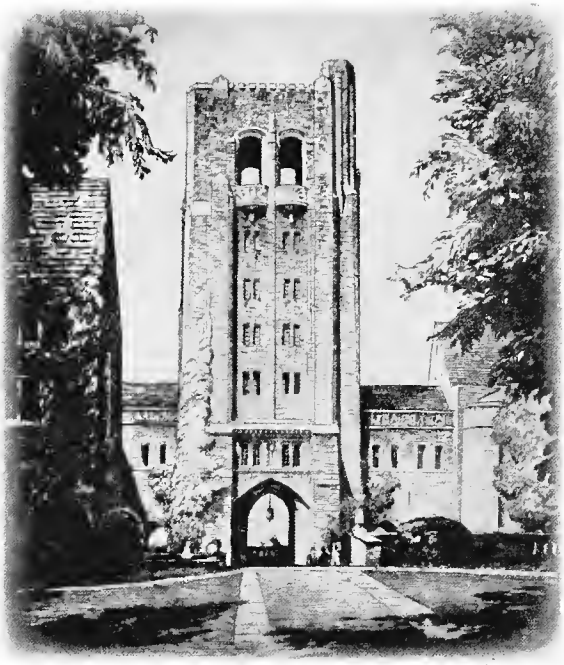

THE LAW OF TORTS.

A TREATISE

ON THE

PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW.

BY

FREDERICK POLLOCK,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW;
CORPUS PROFESSOR OF JURISPRUDENCE IN THE UNIVERSITY OF OXFORD; PROFESSOR OF COMMON LAW IN THE INNS OF COURT; LATE FELLOW OF TRINITY COLLEGE, CAMBRIDGE; AND HONORARY DOCTOR OF LAWS IN THE UNIVERSITY OF EDINBURGH.

Author of "Principles of Contract," "A Digest of the Law of Partnership," &c.

NEW YORK AND ALBANY
BANKS & BROTHERS, LAW PUBLISHERS
1897

TO THE MEMORY

OF

THE RIGHT HONOURABLE

SIR JAMES SHAW WILLES, KNT.

SOMETIME A JUSTICE OF THE COMMON BENCH,

A MAN COURTEOUS AND ACCOMPLISHED,

A JUDGE WISE AND VALIANT.

TO THE HONOURABLE

OLIVER WENDELL HOLMES, Junr.,

A JUSTICE OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

My Dear Holmes,

A preface is a formal and a tedious thing at best; it is at its worst when the author, as has been common in law-books, writes of himself in the third person. Yet there are one or two things I wish to say on this occasion, and cannot well say in the book itself; by your leave, therefore, I will so far trespass on your friendship as to send the book to you with an open letter of introduction. It may seem a mere artifice, but the assurance of your sympathy will enable me to speak more freely and naturally, even in print, than if my words were directly addressed to the profession at large. Nay more, I would fain sum up in this slight token the brotherhood that subsists, and we trust ever shall, between all true followers of the Common Law here and on your side of the water; and give it to be understood, for my own part, how much my work owes to you and to others in America, mostly citizens of your own Commonwealth, of whom some are known to me only by their published writing, some by commerce of letters; there are some also, fewer than I could wish, whom I have had the happiness of meeting face to face.

When I came into your jurisdiction, it was from the Province of Quebec, a part of Her Majesty's dominions which is governed, as you know, by its old French law, lately repaired and beautified in a sort of Revised Version of the Code Napoléon. This, I doubt not, is an excellent thing in

its place. And it is indubitable that, in a political sense, the English lawyer who travels from Montreal to Boston exchanges the rights of a natural-born subject for the comity accorded by the United States to friendly aliens. But when his eye is caught, in the every-day advertisements of the first Boston newspaper he takes up, by these words—"Commonwealth of Massachusetts: Suffolk to wit"—no amount of political geography will convince him that he has gone into foreign parts and has not rather come home. Of Harvard and its Law School I will say only this, that I have endeavoured to turn to practical account the lessons of what I saw and heard there, and that this present book is in some measure the outcome of that endeavour. It contains the substance of between two and three years' lectures in the Inns of Court, and nearly everything advanced in it has been put into shape after, or concurrently with, free oral exposition and discussion of the leading cases.

My claim to your goodwill, however, does not rest on these grounds alone. I claim it because the purpose of this book is to show that there really is a Law of Torts, not merely a number of rules of law about various kinds of torts—that this is a true living branch of the Common Law, not a collection of heterogeneous instances. In such a cause I make bold to count on your sympathy, though I will not presume on your final opinion. The contention is certainly not superfluous, for it seems opposed to the weight of recent opinion among those who have fairly faced the problem. You will recognize in my armoury some weapons of your own forging, and if they are ineffective, I must have handled them worse than I am willing, in any reasonable terms of humility, to suppose.

It is not surprising, in any case, that a complete theory of Torts is yet to seek, for the subject is altogether modern. The earliest text-books I have been able to find is a meagre and unthinking digest of "The Law of Actions on the Case for Torts and Wrongs" published in 1720, remarkable chiefly for the depths of historical ignorance which it occasionally reveals. The really scientific treatment of

principles begins only with the decisions of the last fifty years; their development belongs to that classical period of our jurisprudence which in England came between the Common Law Procedure Act and the Judicature Act. Lord Blackburn and Lord Bramwell, who then rejoiced in their strength, are still with us. It were impertinent to weigh too nicely the fame of living masters; but I think we may securely anticipate posterity in ranking the names of these (and I am sure we cannot more greatly honour them) with the name of their colleague Willes, a consummate lawyer too early cut off, who did not live to see the full fruit of his labour.

Those who knew Mr. Justice Willes will need no explanation of this book being dedicated to his memory. But for others I will say that he was not only a man of profound learning in the law, joined with extraordinary and varied knowledge of other kinds, but one of those whose knowledge is radiant, and kindles answering fire. To set down all I owe to him is beyond my means, and might be beyond your patience; but to you at least I shall say much in saying that from Willes I learnt to taste the Year Books, and to pursue the history of the law in authorities which not so long ago were collectively and compendiously despised as "black letter." It is strange to think that Manning was as one crying in the wilderness, and that even Kent dismissed the Year Books as of doubtful value for any purpose, and certainly not worth reprinting. You have had a noble revenge in editing Kent, and perhaps the laugh is on our side by this time. But if any man still finds offence, you and I are incorrigible offenders, and like to maintain one another therein as long as we have breath; and when you have cast your eye on the historical note added to this book by my friend Mr. F. W. Maitland, I think you will say that we shall not want for good suit.

One more thing I must mention concerning Willes, that once and again he spoke or wrote to me to the effect of desiring to see the Law of Obligations methodically treated

in English. This is an additional reason for calling him to mind on the completion of a work which aims at being a contribution of materials towards that end: of materials only, for a book on Torts added to a book on Contracts does not make a treatise on Obligations. Nevertheless this is a book of principles if it is anything. Details are used, not in the manner of a digest, but so far as they seem called for to develop and illustrate the principles; and I shall be more than content if in that regard you find nothing worse than omission to complain of. But the toils and temptations of the craft are known to you at first hand; I will not add the burden of apology to faults which you will be ready to forgive without it. As to other readers, I will hope that some students may be thankful for brevity where the conclusions are brief, and that, where a favourite topic has invited expatiation or digression, some practitioner may some day be helped to his case by it. The work is out of my hands, and will fare as it may deserve: in your hands, at any rate, it is sure of both justice and mercy.

I remain,

Yours very truly,

FREDERICK POLLOCK.

LINCOLN'S INN,
Christmas Vacation, 1886.

TABLE OF CONTENTS.

Book I.

GENERAL PART.

CHAPTER I.

The Nature of Tort in general.

[The paging refers to the [*] pages.]

	Page
Absence of authoritative definition	1
Historical distinctions	5
Personal wrongs	7
Wrongs to property	7
Wrongs affecting person and property	7
Wilful wrongs	8
Wrongs unconnected with moral blame	9
Wrongs of imprudence and omission	10
Historical anomaly of law of trespass and conversion	12
Early forms of action	13
Rationalized version of law of trespass	15
Analogies of Roman law	16
Dolus and *Culpa*	17
Liability *quasi ex delicto*	18
Summary of results	18

CHAPTER II.

Principles of Liability.

Want of generality in early law	21
General duty not to do harm in modern law	22
Breach of specific legal duty	23
Duty of respecting property	24
Duties of diligence	24
Assumption of skill	24
Exception of action under necessity	25
Liability in relation to consequences of act or default	26
Measure of damages	27
"Immediate cause"	28
Liability for consequences of wilful act	29
"Natural consequences"	30
"Natural and probable" consequence	31
Liability for consequences of trespass	34

[The paging refers to the [*] pages.]

PAGE
Consequences too remote 35
Liability for negligence 36
Contrasted cases of non-liability and liability: Cox *v.* Burbridge; Lee *v.* Riley 40
Metropolitan Rail. Co. *v.* Jackson 41
Non-liability for consequences of unusual state of things: Blyth *v.* Birmingham Waterworks Co 42
Sharp *v.* Powell 42
Whether same rule holds for consequences of wilful wrong: Clark *v.* Chambers 43
Consequences natural in kind though not in circumstance 45

CHAPTER III.

Persons affected by Torts.

1. *Limitations of Personal Capacity.*

Personal status immaterial in law of tort: but capacity material 46
Exceptions: Convicts and aliens 47
Infants 47
Married women: the common law 49
Married Women's Property Act, 1882 49
Common law liability of infants and married women 50
Corporations 51
Responsibility of public bodies for management of works under their control 51

2. *Effect of a Party's Death.*

Actio personalis moritur cum persona 52
Qu. of the extension of the rule in Osborn *v.* Gillett 54
Exceptions: Statutes of Edw. III. giving executors right of suit for trespasses 56
Of Will. IV. as to injuries to property 57
No right of action for damage to personal estate consequential on personal injury 57
Lord Campbell's Act: rights created by it 58
Construction 59
Interests of survivors distinct 60
Statutory cause of action is in substitution not cumulative 61
Scottish and American laws 61
Right to follow property wrongfully taken or converted 61
Rule limited to recovery of specific property or its value: Phillips *v.* Homfray 62

3. *Liability for the Torts of Agents and Servants.*

Command of principal does not excuse agent's wrong 63
Cases of special duty, absolute or in nature of warranty, distinguished 64
Modes of liability for wrongful acts of others: command and ratification 65
Master and servant 66
Reason of master's liability 67
Who is a servant 69
Specific assumption of control 70
Temporary transfer of service 71
"Power of controlling the work" explained 71
What is in course of employment 72

[The paging refers to the [*] pages.]

PAGE

(a) Execution of specific orders 72
(b) Negligence in conduct of master's business 73
Departure or deviation from master's business 74
(c) Excess or mistake in execution of authority 76
Interference with passengers by guards, &c. 77
Arrest of supposed offenders 78
Act wholly outside authority: master not liable 79
(d) Wilful trespasses, &c., for master's purposes 80
Fraud of agent or servant 81
Liability of firm for fraud of a partner 83
Injuries to servants by fault of fellow-servants 84
Common law rule of master's immunity 84
Reason given in the later cases 85
Servants need not be about same kind of work 86
Provided there is a general common object 87
Relative rank of servants immaterial 88
Volunteer assistant on same footing as servant 89
Exception where master interferes in person 89
Employers' Liability Act, 1880 89
Resulting complication of the law 90

CHAPTER IV.

General Exceptions.

Conditions excluding liability for act *prima facie* wrongful 92
General and particular exceptions 93

1. *Acts of State.*

Acts of state 94
General ground of exemption 95
Local actions against viceroy or governor 96
Acts of foreign powers 97
Summary 98

2. *Judicial Acts.*

Judicial Acts 99
Liability by statute in special cases 100
Judicial acts of persons not judges 100

3. *Executive Acts.*

Executive Acts 101
Acts of Naval and Military Officers 103
Of other public authorities 104
Indian Act XVIII. of 1850 104

4. *Quasi-Judicial Acts.*

Acts of quasi-judicial discretion 104
Rules to be observed 105
Absolute discretionary powers 106
Whether duty judicial or ministerial: Ashby *v.* White 106

5. *Parental and Quasi-Parental Authority.*

Authority of parents 107
Of custodians of lunatics 108

[The paging refers to the [*] pages.]

6. *Authorities of Necessity.*

PAGE

Of the master of a ship 108

7. *Damage incident to authorized Acts.*

Damage incidentally resulting from lawful act 109
Damage from execution of authorized works 110
No action for unavoidable damage 111
Care and caution required in exercise of discretionary powers 112

8. *Inevitable Accident.*

Inevitable accident resulting from lawful act 115
On principle such act excludes liability 117
Apparent conflict of authorities 118
American decisions: The Nitro-Glycerine Case (Sup. Ct. U. S.) 119
Brown *v.* Kendall (Mass.) 120
Other American cases 121
English authorities: cases of trespass and shooting 123
Cases where exception allowed 127

9. *Exercise of Common Rights.*

Immunity in exercise of common rights 129
Digging wells, &c., in a man's own land 132
Chasemore *v.* Richards 132
Other applications of same principle 133
Whether malice material in these cases 136
Roman doctrine of "animus vicino nocendi" 136
No exclusive right to names 138

10. *Leave and Licence.*

Consent or acceptance of risk 138
Express licence 139
Limits of consent 139
Licence obtained by fraud 142
Extended meaning of *volenti non fit injuria* 142
Relation of these cases to inevitable accident 143
Distinction from cases where negligence is ground of action 145

11. *Works of Necessity* 146

12. *Private Defence.*

Self-defence 147
Killing of animals in defence of property 148
Injury to third persons in self-defence 149

13. *Plaintiff a wrong-doer.*

Harm suffered by a wrong-doer 150
Sunday travelling: conflict of opinion in U. S. 152
Cause of action connected with unlawful agreement 153

CHAPTER V.

Of Remedies for Torts.

Diversity of remedies 154
Self-help 155
Judicial remedies: damages 156

[The paging refers to the [*] pages.]

PAGE
Nominal damages 157
Nominal damages possible only when an absolute right is infringed . . 158
Cases where the damage is the gist of the action 159
Peculiarity of law of defamation 160
Ordinary damages 161
Exemplary damages 162
Analogy of breach of promise of marriage to torts in this respect . . 164
Mitigation of damages 164
Concurrent but severable causes of action 165
Injunctions 165
On what principle granted 166
Former concurrent jurisdiction of common law and equity to give compensation for fraud 167
Special statutory remedies when exclusive 168
Joint wrong-doers 170
Rules as to contribution and indemnity 170
Supposed rule of trespass being "merged in felony" 172
No known means of enforcing rule if it exists 173
Locality of wrongful act as affecting remedy in English Court 175
Acts not wrongful by English law 175
Acts justified by local law 175
Act wrongful by both laws 176
Phillips *v.* Eyre 177
Limitation of actions 179
Suspension of the statute by disabilities 180
Special protection of justices, constables, &c. 181
Exception of concealed fraud 181
Conclusion of General Part 184

Book II.

SPECIFIC WRONGS.

CHAPTER VI.

Personal Wrongs.

1. *Assault and Battery.*

What is a battery 182
What an assault 183
Excusable acts 185
Self-defence 187
Menace distinguished from assault 187
Summary proceedings when a bar to civil action 188

II. *False Imprisonment.*

What is false imprisonment 188
Justification of arrest and imprisonment 190
Who is answerable 190
Reasonable and probable cause 192

[The paging refers to the [*] pages.]

III. *Injuries in Family Relations.*

PAGE
Protection in personal relations 194
Historical accidents of the common law herein 195
Trespass for taking away wife, &c., and *per quod servitium amisit* 195
"Criminal conversation" 196
Enticing away servants 197
Actions for seduction in modern practice 198
Damages 200
Services of young child 200
Capricious operations of the law 201
Constructive service in early cases 201
Intimidation of servants and tenants 202

CHAPTER VII.

DEFAMATION.

Civil and criminal jurisdiction 204
Slander and libel 204

1. *Slander.*

When slander is actionable 206
Meaning of "*prima facie* libellous" 206
Special damage 207
Repetition of spoken words 208
Special damages involves definite temporal loss 208
Imputation of criminal offence 209
Charges of mere immorality not actionable 210
Imputation of contagious diseases 211
Evil-speaking of a man in the way of his business 211
Words indirectly causing damage to a man in his business 213

2. *Defamation in General.*

Defamation 214
"Implied malice" 214
What is publication 214
Vicarious publication 216
Construction of words: *Innuendo* 216
Libellous tendency must be probable in law and proved in fact 218
Repetition and reports may be libellous 218

3. *Exceptions.*

Exceptions: fair comment 219
What is open to comment, matter of law 221
Whether comment is fair, matter of fact 222
Justification on ground of truth 222
Must be substantially complete 223
Defendant's belief immaterial 224
Parliamentary and judicial immunity 225
Other persons in judicial proceedings 225
Reports of officers, &c., ... 226
Qualified immunity of "privileged communications" 227
Conditions of the privilege 227
"Express malice" 228
What are privileged occasions 228

[The paging refers to the [*] paging.]

PAGE
Moral or social duty 229
Self-protection 230
Information for public good 230
Fair reports 231
Parliamentary papers 231
Parliamentary debates and judicial proceedings 232
Volunteered reports 232
Newspaper Libel and Registration Act, 1881 233
Excess of privilege 233
Honest belief is not necessarily reasonable belief 234
Statutory defences 235

CHAPTER VIII.

Wrongs of Fraud and Malice.

I. *Deceit.*

Nature of the wrong 236
Concurrent jurisdiction of common law and equity 236
Difficulties of the subject: complication with contract 237
Questions of fraudulent intent 238
Fraud of agents 239
General conditions of right of action 239
(a) Falsehood in fact 241
Misrepresentations of law 242
Falsehood by garbled statements 243
(b) Knowledge or belief of defendant 243
Representations subsequently discovered to be untrue . . 244
Reckless assertions 245
Breach of special duty to give correct information 246
False assertion as to matters within party's former knowledge 247
(c) Intention of the statement 248
Representations to class: Polhill *v.* Walter . . . 249
Denton *v.* G. N. R. Co. 250
Peek *v.* Gurney 250
(d) Reliance on the representation 251
Means of knowledge immaterial without independent inquiry 252
Perfunctory inquiry will not do . 253
Ambiguous statements . . 254
(e) Lord Tenterden's Act 254
Quaere as to law under Judicature Acts . . . 256
Misrepresentation by agents . . . 256
Liability of corporations herein 258
Reason of an apparently hard law 259

II. *Slander of Title.*

Slander of title 260
Recent extensions of the principle 261
Trade marks and trade names 263

III. *Malicious Prosecution and Abuse of Process.*

Malicious prosecution 264
Malicious civil proceedings 267

[The paging refers to the [*] pages.]

IV. *Other Malicious Wrongs.*

PAGE
Conspiracy 267
Malicious interference with one's occupation 269
Contract 270
Or franchise 270
Maintenance 271

CHAPTER IX.

Wrongs to Possession and Property.

I. *Duties regarding Property generally*

Absolute duty to respect other's property 272
Title, justification, excuse 272
Title dependent on contract 273
Exceptional protection of certain dealings in good faith 274
Common law rights and remedies 275
Possession and detention 276
Trespass and conversion 278
Alternative remedies 279

II. *Trespass.*

What shall be said a trespass 280
Quaere concerning balloons 281
Trespass to goods 282

III. *Injuries to Reversions.*

Wrongs to an owner not in possession 283

IV. *Waste.*

What is waste 285
Modern law of waste 286
Tenants for life 287
Landlord and tenant 288

V. *Conversion.*

Relation of trover to trespass 288
What amounts to conversion 289
Acts not amounting to conversion 292
Dealings under authority of apparent owner 293
Acts of servants 294
Redelivery by bailees 295
Abuse of limited interest 295

VI. *Injuries between Tenants in Common.*

Trespasses between tenants in common 298

VII. *Extended Protection of Possession.*

Rights of *de facto* possessor against strangers 299
Rights of owner entitled to resume possession 301
Rights of derivative possessors 302
Possession derived through trespasser 302

[The paging refers to the [*] pages.]

VIII. *Wrongs to Easements, &c.*

PAGE
Violation of incorporeal rights 304

IX. *Grounds of Justification and Excuse.*

License 305
Revocation of licence 306
Distinction from grant as regards strangers 308
Justification by law 309
Re-entry: herein of forcible entry 309
Fresh re-entry on trespasser 312
Recaption of goods 313
Process of law: breaking doors 314
Distress 315
Damage feasant 315
Entry of distrainor 316
Trespasses justified by necessity 317
Fox-hunting not privileged 319
Trespass *ab initio* 319

X. *Remedies.*

Taking or retaking goods 321
Costs where damages nominal 322
Injunctions 323
Effect of changes in procedure 323

CHAPTER X.

NUISANCE.

Nuisance, public or private 324
Private right of action for public nuisance 325
Special damage must be shown 326
Private nuisance, what 328
Kinds of nuisance affecting—
1. Ownership 329
2. *Jura in re aliena* 330
3. Convenience and enjoyment 330
Measure of nuisance 330
Injury to health need not be shown 331
Plaintiff not disentitled by having come to the nuisance 331
Innocent or necessary character of offensive occupation, or convenience of place, no answer 333
Modes of annoyance 334
Injury common to the plaintiff with others 336
Obstructions of lights 336
Nature of the right to light 337
Any substantial diminution is a wrong 337
Supposed rule as to angle of forty-five degrees 338
Enlargement or alteration of lights 338
"Nuisance" to market or ferry 339
Remedies for nuisance 340
Abatement 340

[The paging refers to the [*] pages.]

PAGE
Notice to wrong-doer 341
Nuisances of omission 342
Old writs 343
Damages 343
Injunctions 344
Difficulty or expense of abatement no answer 348
Parties entitled to sue for nuisance 349
Parties liable 350

CHAPTER XI.

NEGLIGENCE.

I. *The General Conception.*

Omission contrasted with action as ground of liability 352
General duty of caution in acts 353
Overlapping of contract and tort 353
Definition of negligence 355
Standard of duty is external 357
Diligence includes competence 358

II. *Evidence of Negligence.*

Negligence a question of mixed fact and law 359
Burden of proof 360
Where there is a contract or undertaking 362
Things within defendant's control 363
On evidence sufficient in law, question is for jury 364
Metropolitan R. Co. *v.* Jackson 365
Cases of level crossings 367
"Invitation to alight" 368
Complications with contributory negligence 369
"Evidence of negligence;" Smith *v.* L. & S. W. R. Co 369
No precise general rule 371
Due care varies as *apparent* risk: application of this to accidents through personal infirmity 372
Distinction where person acting has notice of special danger to infirm or helpless person 373

III. *Contributory Negligence.*

Actionable negligence must be proximate cause of harm: where plaintiff's own negligence proximate cause, no remedy 374
Tuff *v.* Warman 375
Radley *v.* L. & N. W. R. Co. 376
Earlier illustrations: Davies *v.* Mann 378
Butterfield *v.* Forrester 379
Where defendant's negligence not proximate cause for other reasons . . . 380
Collisions where both drivers are negligent 381
Accidents to children in custody of adult 381
Children, &c. unattended 382
"Identification" 383
Admiralty rule of dividing loss 385

[The paging refers to the [*] pages.]

IV. *Auxiliary Rules and Presumptions.*

PAGE
Action under difficulty caused by another's negligence 386
No duty to anticipate negligence of others 387
Choice of risks under stress of another's negligence 388
Clayards *v.* Dethick 388
Doctrine of New York Courts 390
Difficulty where negligence of more than one person concurs 391

CHAPTER XII.

DUTIES OF INSURING SAFETY.

Exceptions to general limits of duties of caution 393
Rylands *v.* Fletcher 394
Exception of act of God 400
Act of stranger, &c. 401
Authorized works 402
G. W. R. Co. of Canada *v.* Braid 403
Other cases of insurance liability 404
Duty of keeping in cattle 404
Dangerous or vicious animals 406
Fire, firearms, &c. 407
Duty of keeping in fire, ... 407
Carrying fire in locomotives 408
Fire-arms: Dixon *v.* Bell 409
Explosives and other dangerous goods 410
Gas escapes 411
Poisonous drugs: Thomas *v.* Winchester 411
Difficulties felt in England: George *v.* Skivington 413
Duties of occupiers of buildings in respect of safe repair 414
Modern date of the settled rule: Indermaur *v.* Dames 415
Persons entitled to safety 417
Duty in respect of carriages, ships, &c. 418
Limits of the duty 419
Duty towards passers-by 420
Presumption of negligence (*res ipsa loquitur*) 421
Distinctions 424
Position of licensees 424
Host and guest 426
Liability of licensor for "ordinary negligence" 427
Owner not in occupation 427

CHAPTER XIII.

SPECIAL RELATIONS OF CONTRACT AND TORT.

Original theory of forms of action 429
Actions on the case 430
Causes of action: modern classification as founded on contract or tort . . 431
Classes of questions arising 432

[The paging refers to the [*] pages.]

1. *Alternative Forms of Remedy on the same Cause of Action.*

PAGE
One cause of action and alternative remedies 432
Common law doctrine of misfeasance 433
Special duty of carriers and innkeepers by custom of the realm . 435
Alternative of form does not affect substance of duty or liability . . . 435
In modern law obligation wholly in contract 437
Limits of the rule 438

2. *Concurrent Causes of Action.*

Cases of tort, whether contract or no contract between same parties . . . 439
Contract "implied in law" and waiver of tort . . . 441
Implied warranty of agent's authority . . . 442
Concurrent causes of action against different parties . . . 443
Foulkes *v.* Metropolitan Dis. R. Co. 443
Causes of action in contract and tort at suit of different plaintiffs . . . 444
Alton *v.* Midland R. Co.: *qu.* whether good law . . . 445
Winterbottom *v.* Wright, &c. 448
Concurrence of breach of contract with delict in Roman law . . 450

3. *Causes of Action in Tort dependent on a Contract between the same Parties.*

Causes of action dependent on a collateral contract 450
What did Lumley *v.* Gye decide? 450
Special damage 451
Malice 452
Question of remoteness of damage . . . 453
Motive as an ingredient in the wrong 454
American doctrine 455
Damage to stranger by breach of contract 455
Position of receiver of erroneous telegram: different views in England and United States 456
The conflict considered on principle 458
Uncertainty still remaining in English doctrine 460
Character of morally innocent acts affected by extraneous contract 461

4. *Measure of Damages and other incidents of the Remedy.*

Measure of damages 463
Rule as to consequential damage 464
Penal character of action for breach of promise of marriage 465
Contracts on which executors cannot sue 465

APPENDIX.

A.—Historical note on the classification of the forms of personal action. (By Mr. F. W. Maitland.) 467

B.—Employers' Liability Act, 1880 475

C.—Statutes of Limitation:
21 James I., c. 16, ss. 3, 7 481
4 & 5 Anne c. 3, s. 19 482
19 & 20 Vict. c. 97 (Mercantile Law amendment Act), s. 12 . . . 483

D.—Contributory negligence in Roman law 484

TABLE OF CASES.

[The paging refers to the [*] pages.]

A.

	PAGE
ABRAHAM *v.* Reynolds	427
Abrath *v.* N. E. Rail. Co.	264
Ackers *v.* Howard	107
Acton *v.* Blundell	132, 133
Adams *v.* L. & Y. Rail. Co.	388
Adamson *v.* Jarvis	171
Addie *v.* Western Bank of Scotland	82
Agincourt, The	109
Alderson *v.* Waistell	117
Aldred's Case	333
Aldrich *v.* Wright	149
Alexander *v.* N. E. Rail. Co.	223
——— *v.* Southey	291
Allen *v.* L. & S. W. Rail. Co.	79
——— *v.* Martin	323
Allsop *v* Allsop	209
Alton *v.* M. Rail. Co.	445, 465
Ambergate *v.* M. Rail. Co.	315
Ames *v.* Union Rail. Co.	446
Anderson *v.* Radcliffe	304
Anthony *v.* Haney	313, 314
Applebee *v.* Percy	406
Arlett *v.* Ellis	341
Armory *v.* Delamirie	300, 308
Armstrong *v.* L. & Y. Rail. Co.	380, 381, 384
Arnold *v.* Holbrook	317
Ash *v.* Dawnay	320
Ashby *v.* White	107, 159, 270
Asher *v.* Whitlock	300
Ashworth *v.* Stanwix	89
Atkinson *v.* Newcastle Waterworks Co.	24, 168, 169
A. G. *v.* Cambridge Consumers' Gas Co.	345
——— *v.* Colney Hatch Lunatic Asylum	349
——— *v.* Gas Light and Coke Co.	113
——— *v.* Horner	305
——— *v.* Sheffield Gas Co.	345
Austin *v.* Dowling	192
——— *v.* G. W. Rail Co.	436, 440, 441
Aynsley *v.* Glover	337, 338

B.

	PAGE
BACKHOUSE *v.* Bonomi	159, 180
Baker *v.* Sebright	287
Baldwin *v.* Casella	406
——— *v.* Elphinston	215
Ball, Ex parte	173, 174
—— *v.* Ray	335
Ballacorkish Mining Co. *v.* Harrison	132
Ballard *v.* Tomlinson	133, 400
Bamford *v.* Turnley	333, 334
Bank of New South Wales *v.* Owston	79
Barker *v.* Braham	66, 191
Barnes *v.* Ward	151, 420
Barnett *v.* Guildford	304
Barry *v.* Croskey	240
Barton *v.* Taylor	104
Bartonshill Coal Co. *v.* Reid	68
Barwick *v.* English Joint Stock Bank	66, 82, 278
Bastard *v.* Haneock	473
Batchelor *v.* Fortescue	426
Baten's Case	330, 343
Bayley *v.* M. S. & L. R. Co.	77, 78
Beaumont *v.* Greathead	158
Becher *v.* G. E. Rail. Co.	445
Beckett *v.* M. Rail. Co.	327
Beckham *v.* Drake	466
Beddall *v.* Maitland	310, 311
Beddow *v.* Beddow	166
Bell *v.* M. Rail. Co.	164
Benjamin *v.* Storr	328
Benton *v.* Pratt	261, 455
Bernina, The,	*Addenda*
Berringer *v.* G. E. Rail. Co.	443
Berry *v.* Da Costa	164, 465
Bessey *v.* Olliot	125
Betts *v.* Gibbins	171
Biddle *v.* Bond	295
Bird *v.* Holbrook	144, 151
—— *v.* Jones	189
Biscoe *v.* G. E. Rail. Co.	112, 113
Blades *v.* Higgs	303, 313
Blad's Case (Blad *v.* Bamfield)	175, 177
Blair *v.* Bromley	83
Blake *v.* Barnard	184
——— *v.* M. Rail. Co.	58, 60
Blakemore *v.* Bristol and Exeter Rail. Co.	426
Blamires *v.* L. & Y Rail. Co.	170
Blisset *v.* Daniel	106

[The paging refers to the [*] pages.]

PAGE

Bloodworth *v.* Gray 211
Blyth *v.* Birmingham Waterworks Co. 36, 42, 335, 371
Bolch *v.* Smith 426
Bolingbroke *v.* Swindon Local Board 80
Borrows *v.* Ellison . . . 180
Boson *v.* Sandford 473
Boston *v.* Albany R. R. Co. *v.* Shanly 411
Bourne *v.* Fosbrooke 300
Bowen *v.* Hall . 270, 451, 455, 461
Bower *v.* Peate 424
Bowker *v.* Evans 53
Bowyer *v.* Cook 313, 322
Box *v.* Jubb 401
Bradlaugh *v.* Gossett . . . 104
——— *v.* Newdegate . 271
Bradshaw *v.* L. & Y. Rail. Co. 57
Bridges *v.* N. L. Rail. Co. . . . 369
——— *v.* Grand Junction Canal Co. 379
Brinsmead *v.* Harrison 170, 292
Broadbent *v.* Ledward . . 470
Broder *v.* Saillard 333, 335
Bromage *v.* Prosser . 214
Brooker *v.* Coffin . . . 210
Broughton *v.* Jackson 193
Brown *v.* Boorman 434
——— *v.* Kendall . 118, 120, 128, 399
——— *v.* Notley . 322
Browne *v.* Dawson . 312
Brownlie *v.* Campbell 237
Brunsden *v.* Humphrey . . 165
Brunswick, Duke of, *v.* King of Hanover 97
——————— *v.* Harmer 215
Bryant *v.* Herbert . 15, 472, 474
——— *v.* Lefever . 336
Bubb *v.* Yelverton 287
Bullers *v.* Dickinson . 339
Bulmer *v.* Bulmer 59
Burdett *v.* Abbot . . . 315
Burger *v.* Carpenter . 455
Burgess *v.* Burgess . . 138
——— *v.* Gray . . . 71
Burling *v.* Read . . 340
Burnand *v.* Haggis . 48
Burns *v.* Poulsom . 74
Buron *v.* Denman . . . 95
Burroughes *v.* Bayne . . 285, 291
Burrowes *v.* Loch . . 167, 247, 458
Burrows *v.* Erie Rail. Co. . . 390
Bush *v.* Steinman 70
Buckley *v.* Gross 300
Butterfield *v.* Forrester 379
Byrne *v.* Boadle 422
Bywell Castle, The 387

C.

PAGE

CABELL *v.* Vaughan 473
Calder *v.* Halket 100
Caledonian Rail. Co. *v.* Walker's Trustees 111
Campbell *v.* Spottiswoode . 220
Cape *v.* Scott 316
Capital and Counties Bank *v.* Henty 214, 217
Carey *v.* Ledbitter 334
Carrington *v.* Taylor 269
Carslake *v.* Mapledoram 211
Carstairs *v.* Taylor 402
Carter *v.* Drysdale . . 479
Castle *v.* Duryee 121, 122
Central Rail. Co. of Venezuela *v.* Kisch 253
Chamberlain *v.* Boyd . . . 209
——— *v.* Hazelwood . . . 198
——— *v.* Williamson 54, 465, 473
Chapman *v.* Rothwell 417
Charles *v.* Taylor 88
Chasemore *v.* Richards . 132, 397
Chicago M. & S. Rail. Co. *v.* Ross 91
Child *v.* Hearn . 384, 407
——— *v.* Sands 473
Chinery *v.* Viall . 297, 437
Christopherson *v.* Bare 186
City of London Brewery Co. *v.* Tennant 336, 337
Clark *v.* Chambers 39, 40, 43, 44, 45, 383, 392
——— *v.* Molyneux . . 231, 234
——— *v.* Woods . . . 102
Clarkson *v.* Musgrave 478
Clayards *v.* Dethick 388, 390
Clements *v.* Flight . 470
Closson *v.* Staples . . . 265
Clough *v.* L. & N. W. Rail. Co. . 241
Clowes *v.* Staffordshire Potteries Waterworks Co. . . . 348
Cockle *v.* S. E. Rail. Co. . 368
Cole *v.* Turner . . . 182
Collen *v.* Wright . 55, 442
Collins *v.* Evans . 171, 243
Collis *v.* Selden . . 420, 449
Cornfoot *v.* Fowke . . . 257, 258
Commissioners of Sewers *v.* Glasse 341
Commonwealth *v.* Pierce . . . 358
Cooke *v.* Forbes 345
Cooper *v.* Crabtree 323
——— *v.* Willomatt . . . 292, 296
Corby *v.* Hill 309, 421, 425
Cornish *v.* Stubbs 308
Coryton *v.* Lithebye . . 472
Cotterell *v.* Jones 267

[The paging refers to the [*] pages.]

PAGE

Cotton *v.* Wood 360
Couch *v.* Steel 168
Coulter *v.* Express Co. 390
Courtenay *v.* Earle 434
Coward *v.* Baddeley 185
Cox *v.* Burbidge 40, 405
—— *v.* G. W. Rail. Co. 476
Coxhead *v.* Richards 230
Crabtree *v.* Robinson 317
Cracknell *v.* Corporation of Thetford 112
Crafter *v.* Metrop. Rail. Co. . 364, 371
Cripps *v.* Judge 475
Croft *v.* Alison 74
Crossley *v.* Lightowler . . . 332
Crowhurst *v.* Amersham Burial Board 399
Crump *v.* Lambert . . . 331, 334
Cundy *v.* Lindsay 274, 461

D.

Dalton *v.* Angus 304, 337
—— *v.* S. E. Rail. Co. . . 60
Dalyell *v.* Tyrer 70, 443
Danby *v.* Lamb 470
Dand *v.* Sexton 282
Daniel *v.* Met. Rail. Co. . . 388, 392
Davey *v.* L. & S. W. Rail Co. . . 367
Davies *v.* Mann 378
—— *v.* Marshall 112
—— *v.* Snead 220
—— *v.* Solomon 209
—— *v.* Williams 349
Davis *v.* Duncan 221
—— *v.* Gardiner 210
—— *v.* Saunders 127
—— *v.* Shepstone . . . 222, 231
Dawkins *v.* Antrobus 106
—— *v.* Lord Paulet . . . 223
—— *v.* Lord Rokeby . . 101, 226
—— —— *v.* Prince Edward of Saxe-Weimar . . . 101, 226
Day *v.* Brownrigg . . . 138, 263
Dean *v.* Bennett 106
—— *v.* Peel 199
Dean of St Asaph's Case . . . 123
Degg *v.* M. Rail. Co. . . . 89
Denison *v.* Ralphson 471
Denton *v.* G. N. Rail. Co. 248, 250, 259, 457
De Wahl *v.* Braune 47
Dickenson *v.* N. E. Rail. Co. . . 59
Dickeson *v.* Watson 121
Dicks *v.* Brooks 261
Dickson *v.* Dickson 455
—— *v.* Reuters' Telegram Co. 456, 461

PAGE

Ditcham *v.* Bond 197
Dixon *v.* Bell, 122, 381, 392, 409, 413
Dobell *v.* Stevens 252
Dobree *v.* Napier 178
Donald *v.* Suckling 295
Doss *v.* Secretary of State in Council of India 95
Doughty *v.* Firbank 476
Doulson *v.* Matthews 177
Doyley *v.* Roberts 212
Drake, Ex parte 292
Dublin, &c., R. Co. *v.* Slattery . 387
Du Boulay *v.* Du Boulay . . . 138
Duckworth *v.* Johnson . . . 60
Dunn *v.* Birmingham Canal Co. . 402
Dunston *v.* Young 103
Dyer *v.* Hargrave 253

E.

Eager *v.* Grimwood 200
Ecclesiastical Commissioners *v.* Kino 338
Eckert *v.* Long Island Rail Co. . 391
Edgington *v.* Fitzmaurice 240, 242, 246
Edwards *v.* L. & N. W. Rail. Co. 70
—— *v.* M. Rail. Co. . . . 264
Edwich *v.* Hawkes 310, 311
Elias *v.* Snowdon Slate Quarries Co. 286
Elliott, *Ex parte* 174
—— *v.* Hall 418
Ellis *v.* G. W. Rail. Co. . . . 368
—— *v.* Loftus Iron Co. . . 41, 405
—— *v.* Sheffield Gas Consumers' Co. 66
Emblem *v.* Myers 163
Emmens *v.* Pottle 215
England *v.* Cowley 292
Entick *v.* Carrington . . . 9, 96, 280
European and Australian Royal Mail Co. *v.* Royal Mail Steam Packet Co. 295
Evans *v.* Bicknell 255
—— *v.* Edmonds 246
—— *v.* Walton 198
Eyre, *Ex parte* 83

F.

Fairhurst *v.* Liverpool Adelphi Loan Ass. 48, 49
Falvey *v.* Stanford 157
Farrant *v.* Barnes 410
Farwell *v.* Boston & Worcester Railroad Corporation . 67, 85, 87

[The paging refers to the [*] pages.]

PAGE

Fay v. Prentice 329
Feltham v. England 88
Feun v. Bittleston 297
Filer v. N. Y. Central R. R. Co. . 390
Filliter v. Phippard 408
Fine Art Society v. Union Bank of London 290
Firth v. Bowling Iron Co. . . . 400
Fisher v. Keane 106
Fivaz v. Nicholls 153
Fleming v. Hislop, . . . *Addenda*
Fleming v. M. S. & L. Rail. Co. 438, 448, 461, 474
Fletcher v. Bealey 345
——— v. Rylands 398, 403
——— v. Smith 398
Flewster v. Royle 192
Forsdike v. Stone 163
Foulkes v. Willoughby . . 283, 291
Foulger v. Newcomb 212
Foulkes v. Met. D. Rail. Co. 418, 419, 440, 443, 445, 461
Francis v. Cockrell . . 414, 418
Franconia, The 58
Franklin v. S. E. Rail. Co. . 60
Fray v. Blackburn 100
Freke v. Calmady 286
Fremantle v. L. & N. W. Rail. Co. 403
Fritz v. Hobson . . . 328, 336, 344
Frogley v. Earl of Lovelace . . . 306

G.

GALLAGHER v. Piper 88
Garnett v. Bradley 158
Garret v. Taylor 203
Gas Light & Coke Co. v. Vestry of St. Mary Abbott's . . 114
Gaunt v. Fynney 345
Gautret v. Egerton 424
Geddis v. Proprietors of Bann Reservoir . . . 111, 112
Gee v. Met. Rail. Co. . . 145, 388
George and Richard, The . . 39, 58
——— v. Skivington . 413, 449
Gibbons v. Pepper . . . 127
Gibbs v. Guild 181
—— v. G. W. Rail Co. . . . 476
Gladwell v. Steggall 433, 433
Glasspoole v. Young 103, 314
Gledstane v. Hewett 470
Gloucester Grammar School Case 130
Glover v. L. & S. W. Rail. Co. . 35
Goff v. G. N. Rail. Co. 79
Goffin v. Donnelly 226

PAGE

Goldsmid v. Tunbridge Wells Improvement Commissioners 346
Goodson v. Richardson . . 323
Goodwin v. Chevely 316, 405
Gorham v. Gross . . . 393, 424
Gorris v. Scott 24, 44, 169
Gosden v. Elphick 192
Grainger v. Hill 188
Gray v. Pullen 64
G. W. Rail. Co. of Canada v. Braid 403
Greenland v. Chaplin . . 37
Greenslade v. Halliday 342
Gregory v. Duke of Brunswick 267, 270
——— v. Piper 73
Griffin v. Coleman 190
Griffiths v. Dudley 476
——— v. London & St. Katharine Docks Co. 88
Grinham v. Willey 192
Grinuell v. Wells . . . 200, 201
Guille v. Swan 34
Gully v. Smith 23
Gwinnel v. Eamer 350, 351

H.

HADLEY v. Baxendale . . 27, 463, 464
Hailes v. Marks 192
Hall v. Fearnley . . 127
—— v. Hollander 200
Halley, The . . . 72, 175, 176, 177
Halliday v. Holgate . . . 296
Halsey v. Brotherhood . . 260, 261
Hambly v. Trott . . 62, 471, 472
Hammack v. White . . 25, 360, 361
Hammersmith Rail. Co. v. Brand 111, 112, 409
Harman v. Booth . . . 461
——— v. Johnson . . . 83
Harper v. Charlesworth . . . 300
——— v. Luffkin 199
Harris v. Brisco 271
——— v. De Pinna 336
——— v. Mobbs, ... 37, 328
Harrison v. Bush 230
Harrop v. Hirst . 328, 330, 336
Hart v. Gumpach . . . 226
—— v. Wall 217
Hartley v. Cummings . 197
Harvey v. Brydges . . 311
——— v. Dunlap . . 121
——— v. Harvey . 315
Haycroft v. Creasy 241
Hayes v. Michigan Central Railroad Co. 38
Hayn v. Culliford 418, 419

[The paging refers to the [*] pages.]

PAGE

Heald *v.* Carey 293
Heaven *v.* Pender 353, 354, 413, 418
Hedges *v.* Tagg 199
Helsham *v.* Blackwood 224
Hendriks *v.* Montagu 263
Henwood *v.* Harrison . . 221, 231
Hepburn *v.* Lordan 344
Hermann Loog *v.* Bean 166
Heske *v.* Samuelson 475
Hetherington *v.* N. E. Rail. Co. 60
Hill *v.* Bigge 97
—— *v.* New River Co. . . 37, 45
Hillard *v.* Richardson 70
Hiort *v.* Bott 272, 288, 290
—— *v.* L. & N. W. Rail. Co. 291
Hogg *v.* Ward 191
Hole *v.* Barlow 334
Hollins *v.* Fowler 10, 272, 274, 290, 293, 463
Holmes *v.* Mather 25, 117, 127, 128, 144, 145, 399
——— *v.* N. E. Rail. Co. . . 417
——— *v.* Wilson . . . 313
Honywood *v.* Honywood . 287
Hopkins, The 304
Horne *v.* M. Rail. Co. 464
Horsfall *v.* Thomas . . 251
Hoskin *v.* Royster . 455
Houlden *v.* Smith 99
Houldsworth *v.* City of Glasgow Bank . . . 82, 258
Hounsell *v.* Smyth 425
Howard *v.* Shepherd 450
Howe *v.* Finch 475
Huber *v.* Steiner 178
Huckle *v.* Money 162
Hughes *v.* Macfie 392
——— *v.* Percival 424
Humphries *v.* Cousins 398
Hurdman *v.* N. E. Rail. Co. 133, 398
Hurst *v.* Taylor 421
Hutchins *v.* Hutchins 269
Hyams *v.* Webster . . 64
Hyde *v.* Graham . . . 306, 308
Hydraulic Engineering Co. *v.* McHaffie 464
Hyman *v.* Nye 420

I.

Ibbotson *v.* Peat 269
Ilott *v.* Wilkes 144
Inchbold *v.* Barrington 334
Indermaur *v.* Dawes . . . 416, 418
Inderwick *v.* Snell 106
Irwin *v.* Dearman 200
Ivay *v.* Hedges 426

J.

PAGE

Jackson *v.* Adams 210
Jacobs *v.* Seward 298
James *v.* Campbell 126
Jefferies *v.* G. W. Rail. Co. 300, 301
Jenner *v.* A'Beckett 222
Jennings *v.* Rundall 48, 437
Job *v.* Potton 286, 299
Joel *v.* Morrison 74
John *v.* Bacon 414
Johnson *v.* Emerson 266
——— *v.* Pie 48, 50
——— *v.* Stear 296
Johnstone *v.* Sutton . . 103
Jones *v.* Bird 358
—— *v.* Blocker 455
—— *v.* Boyce 388, 391
—— *v.* Chappell . . . 286, 328, 349
—— *v.* Corporation of Liverpool 70, 71
—— *v.* Festiniog Rail. Co. . . 408
—— *v.* Gooday . . . 167
—— *v.* Hough 293
—— *v.* Jones 340
—— *v.* Powell 332
—— *v.* Starly 455
—— *v.* Wylie 185
Jordin *v.* Crump 149

K.

Kearney *v.* L. B. & S. C. Rail. Co. 422
Keeble *v.* Hickeringill . 135, 203, 269, 270
Keen *v.* Millwall Dock Co. 477
Keighly *v.* Bell 104
Kelk *v.* Pearson 237, 344
Kelly *v.* Sherlock . . 158, 221
—— *v.* Tinling 221
Kemp *v.* Neville 100
Kenyon *v.* Hart 281
Kettle *v.* Bromsall 470
Kiddle *v.* Lovett 476
Kirk *v.* Gregory 272
—— *v.* Todd 63

L.

Labouchere *v.* Wharncliffe . 106
Lambert *v.* Bessey 125
Lancashire Waggon Co. *v.* Fitzhugh 292
Lanfranchi *v.* Mackenzie 338
Langridge *v.* Levy . . . 249, 413, 449
Laughton *v.* Bishop of Sodor and Man 230, 235

[The paging refers to the [*] paging.]

PAGE

Lax v. Corporation of Darlington . . . 145, 390, 418, 419
Leame v. Bray . . 126
Le Mason v. Dixon 473
Lee v. Riley 40. 41, 405
Leggott v. G. N. Rail. Co. 57
Lemprière v. Lange . . . 49
Lewis v. Levy 232
Leyman v. Latimer 211, 224
Limpus v. London General Omnibus Co. 80
Lingwood v. Stowmarket Co. . . 344
Lister v. Perryman . 192, 193
Little v. Hackett . . . 70, 383
Lock v. Ashton 192
L. & B. Rail. Co. v. Truman 114
London, Mayor of v. Cox. . . 162
L. & N. W. Rail. Co. v. Bradley 172
Longmeid v. Holliday 413, 449
Lonsdale, Earl of v. Nelson . 329, 341, 342
Lord v. Price 289
Losee v. Buchanan . . 398, 409
—— v. Clute . . . 420
Lovell v. Howell . . . 86
Lowe v. Fox . . . 49
Lows v. Telford 310
Lowther v. Earl of Radnor 100
Luby v. Wodehouse 97
Lumley v. Gye 55, 196, 197, 202, 203, 270, 451, 452, 454
Lyde v. Barnard . 255, 256
Lyell v. Ganga Dai 410
Lynch v. Knight . 208, 209, 453
—— v. Nurdin . . . 39
Lyon v. Fishmongers' Co. . 328, 336

M.

MACFADZEN v. Olivant 196
Mackay v. Commercial Bank of New Brunswick . . . 82, 258
Maddison v. Alderson 84
Madras Rail. Co. v. Zemindar of Carvatenagaram . . . 402
Malachy v. Soper 260
Manchester Bonded Warehouse Co. v. Carr 286
Mangen v. Atterton . . 383
Manley v. Field . . . 199
Manzoni v. Douglas . 361
Marsh v. Billings 262
—— v. Keating 172, 174
Marshall v. York, Newcastle & Berwick Rail. Co. 441, 445
Marshalsea, The 102

PAGE

Martin v. G. I. P. R. Co. . 445
—— v. Payne 199
Marzetti v. Williams 437
Masper v. Brown 188
Maund v. Monmouthshire Canal Co. 51
Mayor of Colchester v. Brooke . 379
May v. Burdett 406
M'Cully v. Clark 364
M'Manus v. Crickett 80
McGiffen v. Palmer's Shipbuilding Co. 475
McLaughlin v. Prior . . . 71
McMahon v. Field 464
McPherson v. Daniels . . 214, 218
Meade's and Belt's Case . . . 186
Mears v. L. & S. W. Rail. Co. 289
—— v. Dole . . . 398
Mellor v. Spateman . . . 336
—— v. Watkins 308
Mennie v. Blake . . 284, 303
Merest v. Harvey . 162
Merryweather v. Nixon 170
Mersey Docks Trustees v. Gibbs . 51, 83. 111
Metropolitan Association v. Petch 350
Metropolitan Asylum District v. Hill 113, 114
Metropolitan Bank v. Pooley 266, 271
Metrop. Rail. Co. v. Jackson 41, 364, 365
Midland Ins. Co. v. Smith . 174
Millen v. Fawdry . . 406
Miller v. David . . . 212
Mills v. Graham 470
Millward v. M. Rail. Co. . 476
Mitchell v. Crassweller . . 74, 75
—— v. Darley Main Colliery Co. 159, 180
Moffatt v. Bateman 427, 440
Mogul Steamship Co. v. McGregor, Low & Co 167
Moore v. Metrop. Rail. Co. . . . 79
—— v. Rawson 337, 339
—— v. Robinson 277
Morgan v. Vale of Neath Rail. Co. 87
—— v. Lond. Gen. Omnibus Co 480
Morris v. Platt . . . 121
Moses v. Macfarlane 442
Mostyn v. Fabrigas 97, 176
Mott v. Shoolbred 349
Mouse's Case 146
M. Moxham, The 175
Moyle v. Jenkins 477
Mullen v. St. John 423
Mulligan v. Cole 217
Mulliner v. Florence 297

[The paging refers to the [*] pages.]

PAGE

Mumford *v.* Oxford 350
Munday *v.* Thames Ironworks Co 478
Munster *v.* Lamb . . 225
Murphy *v.* Deane 362
Murray *v.* Currie 70, 71
——— *v.* Hall 299

N.

Nash *v.* Lucas 317
National Plate Glass Insurance Co. *v.* Prudential Assurance Co. . 339
Neate *v.* Denman . . . 105
Nelson *v.* Liverpool Brewery Co. 351
Newson *v.* Pender . 339
Newton *v.* Harland . . 311
Nichols *v.* Marsland . . 117, 401
Nitro-Glycerine Case 119, 128, 399
Norris *v.* Baker 341
North Eastern Rail. Co. *v.* Wanless 367, 387
Northampton's, Earl of, Case . . 219
Nugent *v.* Smith 400, 438
Nuttall *v.* Bracewell 308

O.

Ormerod *v.* Todmorden Mill Co . 308
Osborn *v.* Gillett . . 54, 55, 196
Osborne *v.* Jackson 475, 479
Oxley *v.* Watts 320

P.

Page *v.* Southampton, &c. Rail. Co 322
Paley *v.* Garnett 475
Palmer *v.* Thorpe 210
Pandorf *v.* Hamilton . . 402
Pappa *v.* Rose . . . 101
Pardo *v.* Bingham . . 180
Parker *v.* First Avenue Hotel Co. 338
Parkes *v.* Prescott 216
Parkins *v.* Scott . . 208, 219
Parlement Belge, The . . 98
Parry *v.* Smith 411
Pasley *v.* Freeman . . 241, 255
Patrick *v.* Colerick . . . 313
Paul *v.* Summerhayes . . . 319
Pease *v.* Gloahec 461
Peek *v.* Gurney . . 63, 167, 240, 250
Pendlebury *v.* Greenhalgh . . 70

PAGE

Pennington *v.* Brinsop Hall Coal Co 348
Penruddock's Case . 329, 343, 351
Perry *v.* Fitzhowe 340, 341
Perryman *v.* Listor . 193
Phillips *v.* Barnet 50
——— *v.* Eyre 97, 175, 177
——— *v.* Homfray, . . 62, 63, 472
——— *v.* L. & S. W. Rail Co 157, 162
Pickard *v.* Smith 415
Pickering *v.* James 107
——— *v.* Rudd . 281
Piggott *v.* E. C. Rail. Co . 403
Pilcher *v.* Rawlins . 274
Pinchon's Case . . 57, 472
Pippin *v.* Sheppard . . . 433
Playford *v.* U. K. Electric Telegraph Co 456
Plimmer *v.* Mayor of Wellington . . . . *Addenda*
Polhill *v.* Walter . 240, 250
Pontifex *v.* Bignold . . . 160
——— *v.* M. Rail. Co 474
Potter *v.* Brown . . . 179
——— *v.* Faulkner 89, 122
Potts *v.* Smith 337
Poulton *v.* L. & S. W. Rail. Co. 79
Powell *v.* Deveney . 40
——— *v.* Fall . . 408
Powys *v.* Blagrave 286
Pozzi *v.* Shipton . 435, 436, 438
Pretty *v.* Bickmore 350, 351
Priestly *v.* Fowler 84
Proctor *v.* Webster 231
Pulling *v.* G. E. Rail. Co. . . . 57
Purcell *v.* Sowler 218, 221
Pursell *v.* Horne . . . 183
Pym *v.* G. N. Rail. Co. 59, 60

Q.

Quarman *v.* Burnett 70
Quartz Hill, &c. Co. *v.* Beall . . 166
——————— *v.* Eyre . 265, 266

R.

Radley *v.* L. & N. W. Rail. Co. 375, 376
Raj Chunder Roy *v.* Shama Soondari Debi 266
Rajmohun Bose *v.* E. I. Rail. Co. 114
Ramsden *v.* Dyson, . . *Addenda*
Randall *v.* Newson . . . 419
Rashdall *v.* Ford 243

[The paging refers to the [*] pages.]

PAGE
Raymond v. Fitch . . 465
Rayner v. Mitchell . . . 76
Read v. Coker 184
—— v. Edward 405, 406
—— v. G. E. Rail. Co. . . . 61
Readhead v. Midland Rail. Co. 419
Redgrave v. Hurd . . . 245, 253
Reece v. Taylor 187
Reese River Silver Mining Co. v. Smith 246
Reg. v. Commissioners of Sewers for Essex . . . 398, 401
—— v. Coney . . 140, 141
—— v. Cotesworth . 183
—— v. James . . . 184
—— v. Judge of City of London Court . . 478
—— v. Latimer . . . 126
—— v. Lesley . . 178
—— v. Lewis . . 140
—— v. Orton 141
—— v. Riley 313
—— v. Smith 29
—— v. St. George . 184
—— v. Train . . . 325
—— v. Williams . . 52
Rex. v. Pease . . 112, 114
Reynell v. Sprye . . 245
Rice v. Manley . 251, 455
—— v. Shute . . . 473
Rich v. Basterfield . . 351
—— v. Pilkington . . . 473
Ricket v. Met. Rail. Co. . 327, 328
Riding v. Smith . . 208, 213
Rigby v. Hewitt . 381, 381
Rist v. Faux . . . 200
Robert Marys' Case 196
Roberts v. Roberts . . 209
——— v. Rose 343
——— v. Wyatt 302
Robinson v. Cone 383
Robson v. N. E. Rail Co. 145, 369, 390
Rogers v. Rajendro Dutt 135, 137
——— v. Spence 165, 301
Romney Marsh, Bailiffs of v. Trinity House 39
Roope v. D'Avigdor 174
Rose v. Miles 327
—— v. N. E. Rail. Co . 390
Rosewell v. Prior . . 351
Ross v. Rugge-Price . . 168
Rourke v. White Moss Colliery Co. 71
Ryder v. Wombwell . . . 366
Rylands v. Fletcher . . 11, 18, 126, 128, 144, 394, 398, 399. 400, 401, 404, 408, 409, 415.

S.

PAGE
SADLER v. Henlock 69
St. Helen's Smelting Co. v. Tipping 332, 346
St. Pancras, Vestry of v. Batterbury 169
Salvin v. North Brancepeth Coal Co 331, 333, 334, 346
Sanders v. Stuart . . . 460
Saner v. Bilton . . . 286
Savile or Savill v. Roberts . . . 266
Saxby v. Manchester and Sheffield Rail. Co 351
Scott v. London Docks Co . 363, 422
——— v. Pape . . . 339
——— v. Seymour 176
Scott v. Shepherd . 30, 44, 125, 149
—— v. Stansfield . 99, 100, 225
Seaman v. Netherclift 226
Secretary of State in Council of India v. Kamachee Boye Sahaba 95
Selby v. Nettlefold . . . 319
Semayne's Case . . 314
Seroka v. Kattenburg . 50
Seton v. Lafone. . *Addenda*
Seward v. The Vera Cruz 58
Seymour v. Greenwood 78
Shaffers v. Gen. Steam Navigation Co. 479
Sharp v. Powell . . . 42, 43, 44, 45
Shaw v. Port Philip Gold Mining Co. 82
Shepheard v. Whitaker . . 213
Sheridan v. New Quay Co. 295
Sherrington's Case . . 472
Shipley v. Fifty Associates 398
Shotts Iron Co. v. Inglis 334
Simpson v. Savage 349
Siner v. N. E. Rail. Co. . . 369
Singer Manufacturing Co. v. Loog 263
——————— v. Wilson 263
Singleton v. E. C. Rail. Co. . . 383
Six Carpenters' Case, The . 320, 321
Skelton v. L. & N. W. Rail Co. 372
Skinner v. L. B. & S. C. Rail. Co. 362
Skipp v. E. C. Rail. Co. . . 88
Slim v. Croucher . . 167, 247
Smith v. Boston Gas Co. . . 411
——— v. Brown 58
——— v. Chadwick . 240, 246, 251, 254
——— v. Cook . . 405
——— v. Earl Brownlow . 340
——— v. Green 32, 464
——— v. L. & S. W. Rail. Co. 355, 369, 403
Smith v. London and St. Katharine Docks Co. 417

[The paging refers to the [*] pages.]

PAGE

Smith *v.* Miller 279
——— *v.* Sydney 192
Sneesby *v.* L. & Y. Rail. Co. . 32
Soltau *v.* De Held 334
Somerville *v.* Hawkins 230
Southcote *v.* Stanley 427
Speight *v.* Oliviera 199, 201
Spill *v.* Maule 230
Staight *v.* Burn 339
Steele *v.* Brannan 232
Stephens *v.* Elwall 290, 295
Stephens *v.* Myers 184
Stetson *v.* Faxon 327
Stevens *v.* Jeacocke 169
——— *v.* Sampson 220, 233
Stevenson *v.* Watson 101
Steward *v.* Young 261
Stikeman *v.* Dawson 48
Stone *v.* Hyde 478, 479
Storey *v.* Ashton 75
Street *v.* Union Bank 138
Sturges *v.* Bridgman 331, 332
Sullivan *v.* Spencer 97
——— *v.* Waters 415, 425
Sutton *v.* Town of Wanwatoso . . 153
Swan *v.* Phillips 256
Sweeny *v.* Old Colony and Newport R. R. Co. 421
Swift *v.* Jewsbury 255
Swire *v.* Francis 82, 258, 259

T.

TANDY *v.* Westmoreland 97
Tapling *v.* Jones 338, 339
Tarlton *v.* McGawley . . 203, 260
Tarry *v.* Ashton 423
Tattan *v.* G. W. Rail. Co. . . 435
Taylor *v.* Ashton 243, 246
——— *v.* Greenhalgh . . 70
——— *v.* Newman 149
Terry *v.* Hutchinson 200
Tharsis Sulphur Co. *v.* Loftus . . 101
Thomas *v.* Quartermaine . . 475
——— *v.* Sorrell 306
——— *v.* Winchester . 411, 412, 449
Thompson *v.* Gibson . . 359
——— *v.* Ross . . . 199
Thorley's Cattle Food Co. *v.* Massam 166, 261
Thorogood *v.* Bryan 381, 384, *Addenda*
Tillett *v.* Ward 405
Timothy *v.* Simpson 190
Tipping *v.* St. Helen's Smelting Co. 331, 332
Todd *v.* Flight 350

PAGE

Tollit *v.* Sherstone 450
Tompson *v.* Dashwood . . . 216, 234
Tozer *v.* Child 107, 271
Traill *v.* Baring 245
Tuberville *v.* Savage . . . 185
Tucker *v.* Linger 288
Tuff *v.* Warman . 375, 380, 384, 386
Tullidge *v.* Wade . . 163, 197
Tunney *v.* M. Rail. Co. . 86
Turberville *v.* Stampe . 68, 408
Turner *v.* Ringwood Highway Board 326, 330
Twomley *v.* Central Park R. R. Co. 391

U.

UDELL *v.* Atherton 239
Underwood *v.* Hewson 125
Usill *v.* Hales 232

V.

VALLANCE *v.* Falle 169
Vandenburgh *v.* Truax 33
Vaspor *v.* Edwards . . . 316, 321
Vaughan *v.* Menlove . . . 356, 357
——— *v.* Taff Vale Rail Co. . 112, 403, 408
Vernon *v.* Keys 242
Vicars *v.* Wilcocks . . 207, 208, 453

W.

WAITE *v.* N. E. Rail. Co. . 381, 384 *Addenda*
Wakelin *v.* L. & S. W. Rail Co. 360, 362
Wakeman *v.* Robinson 127
Walker *v.* Brewster 334
——— *v.* Cronin . . 455
——— *v.* Needham . 470
Walter *v.* Selfe 331
Wandsworth Board of Works *v.* United Telephone Co. . . 281
Ward *v.* Hobbs . . . 24
——— *v.* Lloyd . . 174
Warner *v.* Riddiford 189
Wason *v.* Walter 220, 232
Watkin *v.* Hall 218
Weaver *v.* Ward 124
Webb *v.* Beavan 209
——— *v.* Bird 336
Weblin *v.* Ballard 475, 477
Weems *v.* Mathieson 89

[The paging refers to the [*] pages.]

PAGE

Weir *v.* Bell 239
Weldon *v.* De Bathe 50
——— *v.* Winslow 49
Welfare *v.* L. & B. Rail. Co. . . 424
Wellock *v.* Constantine 174
Wells *v.* Abrahams 173, 174
Wenman *v.* Ash 216
West *v.* Nibbs 315, 321
—— *v.* Smallwood 192
Western Bank of Scotland *v.* Addie 244, 259
West London Commercial Bank *v.* Kitson 242
Whalley *v.* L. & Y. Rail. Co. 150
Whatman *v.* Pearson 74
Whitaker *v.* Forbes 176
Whitham *v.* Kershaw . 161, 164, 167
White *v.* Jameson . 351
—— *v.* Spettigue . . . 172
Whittaker, *Ex parte* 241
Wigsell *v.* School for Indigent Blind 167
Wilbraham *v.* Snow 288
Wilkins *v.* Day 328
Wilkinson *v.* Haygarth 299
Williams *v.* G. W. Rail Co. 38, 39, 364
——— *v.* Jones 76

PAGE

Williamson *v.* Freer 215, 234
Willis *v.* Maclachlan 99
Wilson *v.* McLaughlin 291
——— *v.* Merry 85, 88
——— *v.* Newberry 399, 401
——— *v.* Tumman 66
——— *v.* Waddell 398
Winsmore *v.* Greenbank . . . 198
Winterbottom *v.* Derby 327
——————— *v.* Wright 420, 448, 449
Withes *v.* Hungerford Market Co. 327
Wood *v.* Leadbitter 306, 307
—— *v.* Waud 332
—— *v.* Woad 106
Woodhouse *v.* Walker . . . 284, 286
Woodward *v.* Walton . 197
Worth *v.* Gilling . . 406
Wren *v.* Weild . . . 261
Wright *v.* Leonard . . . 50
——— *v.* Pearson . 407
——— *v.* Ramscot 282

Y.

YARBOROUGH *v.* Bank of England 51
Yates *v.* Jack 338

YEAR BOOKS CITED.

[The paging refers to the [*] pages.]

			PAGE
22	Ass.	100, pl. 67	51
———	———	102, — 76	203
2	Hen. IV.	18, — 5	407
11	———	1-2, — 2	201
———	———	47, — 21	130
———	———	75, — 16	320
19	Hen. VI.	45, — 94	196, 302
———	———	66, — 10	53
21	———	26, — 9	203
22	———	14, — 23	131
———	———	31,	202
———	———	32*b*	202
37	———	37, — 26	318
39	———	7, — 12	308
6	Edw. IV.	7, — 18	124
———	———	8, ———	318
8	———	23, — 41	146
9	———	35, — 10	313, 318
12	———	13, — 9	303
14	———	7, — 13	203
17	———	1,	32
21	———	76*b*, — 9	319
7	Hen. VII.	22, — 3	295
9	———	7, — 4	203
16	———	2, — 7	303
21	———	27, — 5	124, 146, 318
———	———	28, ———	123, 146
———	———	39, — 50	148
27	———	39, — 49	303
12	Hen. VIII.	2,	146
27	———	27, — 10	326, 328

ADDENDA.

[The paging refers to the [*] pages].

Pages 58, 383–385, 391. On Jan. 24, 1887, the Court of Appeal (Lord Esher M. R., Lindley and Lopes L. JJ.) gave judgment in the case of *The Bernina* (reported in the Court below, 11 P. D. 31), and, after full examination of the principles and authorities on contributory negligence, clearly and even emphatically overruled the doctrine of Thorogood *v.* Bryan, 8 C. B. 115, 18 L. J. C. P. 336, whereby a passenger was deemed to be "identified" with the carriage or vessel he was travelling in, so as to be disentitled from recovering damages from the owner of another vessel or carriage for injuries received in a collision caused by the joint negligence of those having the control of both vehicles. All the members of the Court said that the supposed rule of "identification" was unintelligible, contrary to justice, and not confirmed by any binding authority; and Lindley L. J. pointed out that the doctrine of contributory negligence was still imperfectly understood at the time (1849) when Thorogood *v.* Bryan was decided. The true rule is that where damage is sustained by the concurrent negligence of two or more persons, there is a right of action against all or any of them at the plaintiff's option, and the exception of contributory negligence extends only to acts and defaults of the plaintiff himself or those who are really his servants or agents. Waite *v.* N. E. R. Co., E. B. & E. 719, 28 L. J. Q. B. 258, was distinguished and approved on the ground that persons dealing with an adult and also with an infant or imbecile of whom the adult has the charge are entitled, whether their duty be regarded as arising from contract or as independent of contract, to expect that the adult will use reasonable care not only for himself but for the helpless person in his charge. The judgment below was therefore reversed, except as to one plaintiff who had been personally in fault.

The Court also held (on this point affirming the decision below) that actions under Lord Campbell's Act (9 & 10 Vict. c. 93) are "pure common law actions" in no way affected by the special rules and practice of Admiralty jurisdiction, the Court of Admiralty before the Judicature Acts having had no jurisdiction to entertain claims under the Act: the Admiralty rule as to division of damages was therefore inapplicable.

Page 298. A man may be liable as for converson by estoppel, though he in fact has not dealt with the goods at any time when the plaintiff was entitled to possession: see Seton *v.* Lafone (1886) 18 Q. B. D. 139. This is not a variety of conversion, but stands on the distinct principles of the law of estoppel: as to the proper measure of damages, see at p. 146.

Page 308. In the United States cases of great hardship have arisen through the untimely revocation of parol licences to erect dams, divert watercourses, and the like, which but for the Statute of Frauds would have amounted to grants of easements: and in some States the courts have been astute to find a remedy for the licensee by extending the doctrines of equitable estoppel and part performance: see Cooley on Torts 307–310. So far as I can collect from Judge Cooley's account of the decisions, they must be taken as establishing, in those States where they are received, a *jus singulare* which a court bound by Ransden *v.* Dyson (L. R. 1 H. L. 129) could hardly admit, unless there were matter subsequent which could be held to make the original licence irrevocable, as in Plimmer *v.* Mayor of Wellington (N. Z.) (9 App. Ca. 699), decided by the Judicial Committee in 1884.

[The paging refers to the [*] pages.]

Page 322. The opinion of Sir Walter Scott as to the threatening notice-boards is fit to be remembered; nor is excuse needed for quoting in a law book the opinion of one who never ceased to be a sound and a keen lawyer, and whose authorship of the Waverley Novels was detected by that amongst other characters. "Nothing on earth," he said, "would induce me to put up boards threatening prosecution, or cautioning one's fellow-creatures to beware of man-traps and spring-guns. I hold that all such things are not only in the highest degree offensive and hurtful to the feelings of people whom it is every way important to conciliate, but that they are also quite inefficient." Lockhart's Life, vol. vii. p. 317, ed. 1839, *ex relatione* Basil Hall.

Pages 332, 333, 344, note (*g*). In Fleming *v.* Hislop (1886) 11 App. Ca. (Sc.) 686, an interdict which absolutely restrained the appellants from burning or calcining certain heaps of refuse was varied by adding the words "in the manner practised by them in respect of" [a specified heap already burnt] "or in any other manner so as to occasion material discomfort and annoyance to the pursuers or any of them," on the ground that it ought to be left open to the appellants to discover and use, if they could, any process by which the refuse might be calcined without causing a nuisance. It also was incidentally declared, per Lord Halsbury at p. 697, that the rule once supposed to exist as to "coming to the nuisance" is wholly exploded.

TO THE READER.

TEXT-BOOKS are generally cited in the same manner as in my book "Principles of Contract." Mr. Melville M. Bigelow's "Leading Cases on the Law of Torts determined by the Courts of America and England," Boston, Mass. 1875, a most useful work to which I desire to express my special obligation, is cited as Bigelow L. C.

About a year ago, after the plan of this book had been settled and the greater part of it written, two new English books on the subject appeared almost simultaneously. It seems proper to mention that I have purposely abstained from reading either of them, as it was hardly possible to make a strictly fair use of them under the circumstances. With this deliberate exception, I have endeavoured to pay due attention to the work of my predecessors.

It has not been thought needful, in a work professing to select rather than collect authorities, to give references to all the current Reports. The labour seems out of proportion to the result in anything short of a Digest. But all important modern cases are dated, and thus, it is hoped, can be found with little trouble wherever they are reported. It may be useful to note that in the legal year 1865–6, the date of the commencement of the Law Reports, the other Reports of which the publication is still continued were issued as follows:

Law Journal (N. S.).	Weekly Reporter.	Law Times (N. S.).
Vol. 35. (Two volumes a year, of the same consecutive number, distinguished as Chancery and Common Law Series.)	Vol. 14. (One volume a year.)	Vols. 13 and 14. (Two volumes a year.)

The consecutive number (in N. S.) of the volumes of the Law Journal for a given legal year may be found by subtracting 30 from the year of the century in which the legal year (Michaelmas term to Michaelmas term) begins. For the Weekly Reporter, similarly, subtract 51.

L. Q. R. stands for the Law Quarterly Review, commenced in 1885, which is cited by volume and page.

In citing cases in the Law Reports since 1875, Court of Appeal cases are (according to a convenient and now common practice) distinguished by abbreviating "Division" in the form "Div.," so that Ch. D. and Q. B. D. refer to decisions of a single judge or Divisional Court, Ch. Div. and Q. B. Div. to decisions of the Court of Appeal.

I have pleasure in expressing my best thanks to my learned friend Mr. Reginald J. Smith, of Lincoln's Inn, for valuable help in the preparation of the Index and otherwise in passing the work through the press.

F. P.

THE LAW OF TORTS.

CHAPTER I.

THE NATURE OF TORT IN GENERAL.

What is a tort?

Our first difficulty in dealing with the law of torts is to fix the contents and boundaries of the subject. If we are asked, What are torts? nothing seems easier than to answer by giving examples. Assault, libel, and deceit are torts. Trespass to land and wrongful dealing with goods by trespass, "conversion," or otherwise, are torts. The creation of a nuisance to the special prejudice of any person is a tort. Causing harm by negligence is a tort. So is, in certain cases, the mere failure to prevent accidental harm arising from a state of things which one has brought about for one's own purposes. Default or miscarriage in certain occupations of a public nature is likewise a tort, although the same facts may constitute a breach of contract, and may, at the option of the aggrieved party, be treated as such. But we shall have no such easy task if we are required to answer the question, What is a tort?—in other words, what is the principle or element common to all the classes of cases we have enumerated, or might enumerate, and also distinguishing them as a whole from other classes of facts giving rise to legal duties and liabilities? It is far from a simple matter to define a contract. But we have this much to start from, that there * are two parties, of whom one [* 2] agrees to terms offered by the other. There are variant and abnormal forms to be dealt with, but this is the normal one. In the law of torts we have no such starting-point, nothing (as it appears at first sight) but a heap of miscellaneous instances. The word itself will plainly not help us. *Tort* is nothing but the French equivalent of our English word *wrong*. In common speech everything is a wrong, or wrongful, which is thought to do violence to any right. Manslaying, false witness, breach of covenant, are wrongs in this sense.

But thus we should include all breaches of all duties, and therefore should not even be on the road to any distinction that could serve as the base of a legal classification.

History and limits of English classification.

In the history of our law, and in its existing authorities, we may find some little help, but, considering the magnitude of the subject, singularly little. The ancient common law knew nothing of large classifications. There were forms of action with their appropriate writs and process, and authorities and traditions whence it was known, or in theory was capable of being known, whether any given set of facts would fit into any and which of these forms. No doubt the forms of action fell, in a manner, into natural classes or groups. But no attempt was made to discover or apply any general principle of arrangement. In modern times, that is to say, since the Restoration, we find a certain rough classification tending to prevail (*a*). It is assumed, rather than distinctly asserted or established, that actions maintainable in a court of common law must be either actions of contract or actions of tort. This division is exclusive of the real actions for the recovery of land, [*3] already becoming obsolete in the seventeenth *century, and finally abolished by the Common Law Procedure Act, with which we need not concern ourselves: in the old technical terms, it is, or was, a division of personal actions only. Thus torts are distinguished from one important class of causes of action. Upon the other hand, they are distinguished in the modern law from criminal offences. In the mediæval period the procedure whereby redress was obtained for many of the injuries now classified as torts bore plain traces of a criminal or quasi-criminal character, the defendant against whom judgment passed being liable not only to compensate the plaintiff, but to pay a fine to the king. Public and private law were, in truth, but imperfectly distinguished. In the modern law, however, it is settled that a tort, as such, is not a criminal offence. There are various acts which may give rise both to a civil action of tort and to a criminal prosecution, or to the one or the other, at the injured party's option; but the civil suit and the criminal prosecution belong to different jurisdictions, and are guided by different rules of procednre. Torts belong to the subject-matter of Common Pleas as distinguished from Pleas of the Crown. Again,

(*a*) Appendix A.

the term and its usage are derived wholly from the Superior Courts of Westminster as they existed before the Judicature Acts. Therefore the law of torts is necessarily confined by the limits within which those Courts exercised their jurisdiction. Divers and weighty affairs of mankind have been dealt with by other Courts in their own fashion of procedure and with their own terminology. These lie wholly outside the common law forms of action and all classifications founded upon them. According to the common understanding of words, breach of trust is a wrong, adultery is a wrong, refusal to pay just compensation for saving a vessel in distress is a wrong. Yet none of these things is a tort. * An order may [* 4] be made compelling restitution from the defaulting trustee; a decree of judicial separation may be pronounced against the unfaithful wife or husband; and payment of reasonable salvage may be enforced against the ship-owner. But the administration of trusts belongs to the law formerly peculiar to the Chancellor's Court; the settlement of matrimonial causes between husband and wife to the law formerly peculiar to the King's Ecclesiastical Courts; and the adjustment of salvage claims to the law formerly peculiar to the Admiral's Court. These things being unknown to the old common law, there can be no question of tort in the technical sense.

Exclusive limits of "tort."

Taking into account the fact that in this country the separation of courts and of forms of action has disappeared, though marks of the separate origin and history of every branch of jurisdiction remain, we may now say this much. A tort is an act or omission giving rise, in virtue of the common law jurisdiction of the Court, to a civil remedy which is not an action of contract. To that extent we know what a tort is not. We are secured against a certain number of obvious errors. We shall not imagine (for example) that the Married Women's Property Act of 1882, by providing that husbands and wives cannot sue another for a tort, has thrown doubt on the possibility of a judicial separation. But whether any definition can be given of a tort beyond the restrictive and negative one that it is a cause of action (that is, of a "personal" action as above noted) which can be sued on in a court of common law without alleging a real or supposed contract, and what, if any, are the common positive characters of the causes of action that can be so sued upon :—these

are matters on which our books, ransack them as we will, refuse to utter any certain sound whatever. If the col- [* 5] lection of rules which we call the law of *torts is founded on any general principles of duty and liability, those principles have nowhere been stated with authority. And, what is yet more remarkable, the want of authoritative principles appears to have been felt as a want by hardly any one (*b*).

Are any general principles discoverable?

We have no right, perhaps, to assume that by fair means we shall discover any general principles at all. The history of English usage holds out, in itself, no great encouragement. In the earlier period we find a current distinction between wrongs accompanied with violence and wrongs which are not violent; a distinction important for a state of society where open violence is common, but of little use for the arrangement of modern law, though it is still prominent in Blackstone's exposition (*c*). Later we find a more consciously and carefully made distinction between contracts and causes of action which are not contracts. This is very significant in so far as it marks the ever gaining importance of contract in men's affairs. That which is of contract has come to fill so vast a bulk in the whole frame of modern law that it may, with a fair appearance of equality, be set over against everything which is independent of contract. But this unanalysed remainder is no more accounted for by the dichotomy of the Common Law Procedure Act than it was before. It may have elements of coherence within itself, or it may not. If it has, the law of torts is a body of law capable of being expressed in a systematic form and under appropriate general principles, whether any particular attempt so to express it be successful or not. If not, then there is no such thing as the law of torts in the [* 6] sense in which * there is a law of contracts, or of real property, or of trusts, and when we make use of the name we mean nothing but a collection of miscellaneous topics which, through historical accidents, have never been brought into any real classification.

The genera of torts in English law.

The only way to satisfy ourselves on this matter is to examine what are the leading heads of the English law of torts as commonly received. If these point to any

(*b*) The first, or almost the first, writer who has clearly called attention to it is Dr. Markby. See the chapter on Liability in his "Elements of Law."

(*c*) Comm. iii. 118.

sort of common principle, and seem to furnish acceptable lines of construction, we may proceed in the directions indicated; well knowing, indeed, that excrescences, defects, and anomalies will occur, but having some guide for our judgment of what is normal and what is exceptional. Now the civil wrongs for which remedies are provided by the common law of England, or by statutes creating new rights of action under the same jurisdiction, are capable of a three-fold division according to their scope and effects. There are wrongs affecting a man in the safety and freedom of his own person, in honour and reputation (which, as men esteem of things near and dear to them, come next after the person, if after it at all), or in his estate, condition, and convenience of life generally: the word *estate* being here understood in its widest sense, as when we speak of those who are "afflicted or distressed in mind, body, or estate." There are other wrongs which affect specific property, or specific rights in the nature of property: property, again, being taken in a large sense so as to cover possessory rights of every kind. There are yet others which may affect, as the case happens, person or property, either or both. We may exhibit this division by arranging the familiar and typical species of torts in groups, omitting for the present such as are obscure or of little practical moment.

* Group A. [* 7]

Personal Wrongs.

Personal wrongs.

1. Wrongs affecting safety and freedom of the person:
   Assault, battery, false imprisonment.
2. Wrongs affecting personal relations in the family:
   Seduction, enticing away of servants.
3. Wrongs affecting reputation:
   Slander and libel.
4. Wrongs affecting estate generally:
   Deceit, slander of title.
   Malicious prosecution, conspiracy.

Group B.

Wrongs to Property.

Wrongs to property.

1. Trespass: (a) to land.
   (b) to goods.
   Conversion and unnamed wrongs *ejusdem generis*.
   Disturbance of easements, &c.
2. Interferaece with rights analogous to property, such as private franchises, patents, copyrights.

GROUP C.

Wrongs affecting person and property.

Wrongs to Person, Estate, and Property generally.

1. Nuisance.
2. Negligence.
3. Breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous things, and to the exercise of certain public callings. This kind of liability results, as will be seen hereafter, partly from ancient rules of the common law of which the origin is still doubtful, partly from the modern development of the law of negligence.

[*8] *All the acts and omissions here specified are undoubtedly torts, or wrongs in the technical sense of English law. They are the subject of legal redress, and under our old judicial system the primary means of redress would be an action brought in a common law court, and governed by the rules of common law pleading (*d*).

We put aside for the moment the various grounds of justification or excuse which may be present, and if present must be allowed for. It will be seen by the student of Roman law that our list includes approximately the same matters (*e*) as in the Roman system are dealt with (though much less fully than in our own) under the title of obligations *ex delicto* and *quasi ex delicto*. To pursue the comparison at this stage, however, would only be to add the difficulties of the Roman classification, which are considerable, to those already on our hands.

Character of wrongful acts, &c. under the several classes.

The groups above shown have been formed simply with reference to the effects of the wrongful act or omission. But they appear, on further examination, to have certain distinctive characters with reference to the nature of the act or omission itself. In Group A., generally speaking, the wrong is wilful or wanton. Either the act is intended to do harm, or, being an act

Wilful wrongs.

(*d*) In some cases the really effectual remedies were administered by the Court of Chancery, but only as auxiliary to the legal right, which it was often necessary to establish in an action at law before the Court of Chancery would interfere.

(*e*) Trespass to land may or may not be an exception, according to the view we take of the nature of the liabilities enforced by the possessory remedies of the Roman law. Some modern authorities, though not most, regard these as *ex delicto*.

evidently likely to cause harm, it is done with reckless indifference to what may befall by reason of it. Either there is deliberate injury, or there is something like the self-seeking indulgence of passion, in * contempt [* 9] of other men's rights and dignity, which the Greeks called ὕβρις. Thus the legal wrongs are such as to be also the object of strong moral condemnation. It is needless to show by instances that violence, evil-speaking, and deceit, have been denounced by righteous men in all ages. If any one desires to be satisfied of this, he may open Homer or the Psalter at random. What is more, we have here to do with acts of the sort that are next door to crimes. Many of them, in fact are criminal offences as well as civil wrongs. It is a common border land of criminal and civil, public and private law.

Wrongs apparently unconnected with moral blame.

In Group B. this element is at first sight absent, or at any rate indifferent. Whatever may or might be the case in other legal systems, the intention to violate another's rights, or even the knowledge that one is violating them, is not in English law necessary to constitute the wrong of trespass as regards either land or goods, or of conversion as regards goods. On the contrary, an action of trespass—or of ejectment, which is a special form of trespass—has for centuries been a common and convenient method of trying an honestly disputed claim of right. Again, it matters not whether actual harm is done. "By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil" (*f*). Nor is this all; for dealing with another man's goods without lawful authority, but under the honest and * even [* 10] reasonable belief that the dealing is lawful, may be an actionable wrong notwithstanding the innocence of the mistake (*g*). Still less will good intentions afford an excuse. I find a watch lying in the road; intending to do the owner a good turn, I take it to a watchmaker who to the best of my knowledge is competent, and leave it with him to be cleaned. The task is beyond him, or an incompetent hand is employed on it, and the watch is spoilt in the attempt to restore it. Without question the owner may hold me liable. In one

(*f*) Per Cur. Entick *v.* Carrington, 19 St. Tr. 1066.
(*g*) See Hollins *v.* Fowler, L. R. 7 H. L. 757.

word, the duty which the law of England enforces is an absolute duty not to meddle without lawful authority with land or goods that belong to others. And the same principle applies to rights which, though not exactly property, are analogous to it. There are exceptions, but the burden of proof lies on those who claim their benefit. The law, therefore, is stricter, on the face of things, than morality. There may, in particular circumstances, be doubt what is mine and what is my neighbour's; but the law expects me at my peril to know what is my neighbour's in every case. Reserving the explanation of this to be attempted afterwards, we pass on.

Wrongs of imprudence and omission.

In Group C. the acts or omissions complained of have a kind of intermediate character. They are not as a rule wilfully or wantonly harmful; but neither are they morally indifferent, save in a few extreme cases under the third head. The party has for his own purposes done acts, or brought about a state of things, or brought other people into a situation, or taken on himself the conduct of an operation, which a prudent man in his place would know to be attended with certain risks. A man who fails to take order, in things [* 11] within his control, against risk to others * which he actually foresees, or which a man of common sense and competence would in his place foresee, will scarcely be held blameless by the the moral judgment of his fellows. Legal liability for negligence and similar wrongs corresponds approximately to the moral censure on this kind of default. The commission of something in itself forbidden by the law, or the omission of a positive and specific legal duty, though without any intention to cause harm, can be and is, at best, not more favourably considered than imprudence if harm happens to come of it; and here too morality will not dissent. In some conditions, indeed, and for special reasons which must be considered later, the legal duty goes beyond the moral one. There are cases of this class in which liability cannot be avoided even by proof that the utmost diligence in the way of precaution has in fact been used, and yet the party liable has done nothing which the law condemns (*h*).

(*h*) How far such a doctrine can be theoretically or historically justified is no longer an open question for English courts of justice, for it has been explicitly affirmed by the House of Lords: Rylands *v.* Fletcher (1868) L. R. 3 H. L. 330.

Except in these cases, the liability springs from some shortcoming in the care and caution to which, taking human affairs according to the common knowledge and experience of mankind, we deem ourselves entitled at the hands of our fellow-men. There is a point, though not an easily defined one, where such shortcoming gives rise even to criminal liability, as in the case of manslaughter by negligence.

Relation of the law of torts to the semi-ethical precept *Alterum non laedere.*

We have, then, three main divisions of the law of torts. In one of them, which may be said to have a quasi-criminal character, there is a very strong ethical element. In another no such element is apparent. In the third such * an element is present, though [* 12] less manifestly so. Can we find any category of human duties that will approximately cover them all, and bring them into relation with any single principle? Let us turn to one of the best-known sentences in the introductory chapter of the Institutes, copied from a lost work of Ulpian. "Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere." *Honeste vivere* is a vague phrase enough; it may mean refraining from criminal offences, or possibly general good behaviour in social and family relations. *Suum cuique tribuere* seems to fit pretty well with the law of property and contract. And what of *alterum non laedere*? "Thou shalt do no hurt to thy neighbour." Our law of torts, with all its irregularities, has for its main purpose nothing else than the development of this precept (*i*). This exhibits it, no doubt, as the technical working out of a moral idea by positive law, rather than the systematic application of any distinctly legal conception. But all positive law must presuppose a moral standard, and at times more or less openly refer to it; and the more so in proportion as it has or approaches to having a penal character.

Historical anomaly of law of trespass and conversion.

The real difficulty of ascribing any rational unity to our law of torts is made by the wide extent of the liabilities mentioned under Group B, and their want of intelligible relation to any moral conception.

A right of property is interfered with "at the peril of the person interfering with it, and whether his in-

(*i*) Compare the statement of "duty towards my neighbour," in the Church Catechism, probably from the hand of Goodrich, Bishop of Ely, who was a learned civilian: "To hurt nobody by word nor deed: to be true and just in all my dealing . . "

terference be for his own use or that of anybody else" (*k*).

[* 13] * And whether the interference be wilful, or reckless, or innocent but imprudent, or innocent without imprudence, the legal consequences and the form of the remedy are for English justice the same.

Early division of forms of action.

The truth is that we have here to deal with one of the historical anomalies that abound in English law. Formerly we had a clear distinction in the forms of procedure (the only evidence we have for much of the older theory of the law) between the simple assertion or the vindication of title and claims for redress against specific injuries. Of course the same facts would often, at the choice of the party wronged, afford ground for one or the other kind of claim, and the choice would be made for reasons of practical convenience, apart from any scientific or moral ideas. But the distinction was in itself none the less marked. For assertion of title to land there was the writ of right; and the writ of debt, with its somewhat later variety, the writ of detinue, asserted a plaintiff's title to money or goods in a closely corresponding form (*l*). Injuries to person or property, on the other hand, were matter for the writ of trespass and certain other analogous writs, and (from the 13th century onwards) the later and more comprehensive writ of trespass on the case (*m*). In the former [* 14] * kind of process, restitution is the object sought; in the latter some redress or compensation which, there is great reason to believe, was originally understood to be a substitute for retaliation or private vengeance. Now the writs of restitution, as we may collectively call them, were associated with many cumbrous and archaic points of procedure, exposing a

Writs of right and writs of trespass: restitution or punishment.

(*k*) Lord O'Hagan, L. R. 7 H. L. at p. 799.

(*l*) The writ of right (Glanvill, Bk. i. c. 6) runs thus: "Rex vicecomiti salutem: Praecipe A. quod sine dilatione reddat B. unam hidam terrae in villa illa, unde idem B. queritur quod praedictus A. ei deforceat: et nisi fecerit, summone eum," &c. The writ of debt (Bk. x. c. 2) thus: "Rex vicecomiti salutem: Praecipe N. quod iuste et sine dilatione reddat R. centum marcas quas ei debet, ut dicit, et unde queritur quod ipse ei iniuste deforceat. Et nisi fecerit, summone eum," &c. The writ of account also contains the the characteristic words *iuste et sine dilatione*.

(*m*) Blackstone, iii. 122; F. N. B. 92. The mark of this class of actions is the conclusion of the writ *contra pacem*. Writs of assize, including the assize of nuisance, did not so conclude, but show analogies of form to the writ of trespass in other respects. Actions on the case might be founded on other writs besides that of trespass, *e.g.* deceit.

plaintiff to incalculable and irrational risk; while the operation of the writs of penal redress was by comparison simple and expeditious. Thus the interest of suitors led to a steady encroachment of the writ of trespass and its kind upon the writ of right and its kind. Not only was the writ of right first thrust into the background by the various writs of assize—forms of possessory real action which are a sort of link between the writ of right and the writ of trespass—and then superseded by the action of ejectment, in form a pure action of trespass; but in like manner the action of detinue was largely supplanted by trover, and debt by assumpsit, both of these new-fashioned remedies being varieties of trespass on the case (*n*). In this way the distinction between proceedings taken on a disputed claim of right, and those taken for the redress of injuries where the right was assumed not to be in dispute, became quite obliterated. The forms of action were the sole embodiment of such legal theory as existed; and therefore, as the distinction of remedies was lost, the distinction between the rights which they protected was lost also. By a series of shifts and devices introduced into legal practice for the ease of litigants a great bulk of what really belonged to the law of property was transferred, in forensic usage and thence in the * tra- [* 15] ditional habit of mind of English lawyers, to the law of torts. It will be observed that in our early forms of action contract, as such, has no place at all (*o*); an additional proof of the relatively modern character both of the importance of contract in practical life, and of the growth of the corresponding general notion.

Rationalized version of law of trespass.

We are now independent of forms of action. Trespass and trover have become historical landmarks, and the question whether detinue is, or was, an action founded on contract or on tort (if the foregoing statement of the history be correct, it was really neither) survives only to raise difficulties in applying certain provisions of the County Courts Act as to the scale of costs in the Superior Courts (*p*). It would seem, there-

(*n*) For the advantages of suing in case over the older forms of actions, see Blackstone, iii. 153, 155. The reason given at p. 152 for the wager of law being allowed in debt and detinue is some one's idle guess, due to mere ignorance of the earlier history.

(*o*) Except what may be implied from the technical rule that the word *debet* was proper only in an action for a sum of money between the original parties to the contract: F. N. B. 119; Blackstone, iii. 156.

(*p*) Bryant *v.* Herbert (1878) 3 C. P. Div. 389.

fore, that a rational exposition of the law of torts is free to get rid of the extraneous matter brought in, as we have shown, by the practical exigency of conditions that no longer exist. At the same time a certain amount of excuse may be made on rational grounds for the place and function of the law of trespass to property in the English system. It appears morally unreasonable, at first sight, to require a man at his peril to know what land and goods are his neighbour's. But it is not so evidently unreasonable to expect him to know what is his own, which is only the statement of the same rule from the other side. A man can but seldom go by pure unwitting misadventure beyond the limits of his own dominion. Either he knows he is not within his legal right, or he takes no heed, or he knows there is a doubt [*16] as to his right, but, for causes deemed by him * sufficient, he is content to abide (or perhaps intends to provoke) a legal contest by which the doubt may be resolved. In none of these cases can he complain with moral justice of being held to answer for his act. If not wilfully or wantonly injurious, it is done with some want of due circumspection, or else it involves the conscious acceptance of a risk. A form of procedure which attempted to distinguish between these possible cases in detail would for practical purposes hardly be tolerable. Exceptional cases do occur, and may be of real hardship. One can only say that they are thought too exceptional to count in determining the general rule of law. From this point of view we can accept, though we may not actively approve, the inclusion of the morally innocent with the morally guilty trespasses in legal classification.

Analogy of the Roman obligations *ex delicto.*

We may now turn with profit to the comparison of the Roman system with our own. There we find strongly marked the distinction between restitution and penalty, which was apparent in our old forms of action, but became obsolete in the manner above shown. Mr. Moyle (*q*) thus describes the specific character of obligations *ex delicto.*

"Such wrongs as the withholding of possession by a defendant who *bona fide* believes in his own title are not delicts, at any rate in the specific sense in which the term is used in the Institutes; they give rise, it is true, to a right of action, but a right of action is a different thing from an *obligatio ex delicto;* they are redressed

(*q*) In his edition of the Institutes, note to Bk. iv. tit. 1, p. 497.

by mere reparation, by the wrong-doer being compelled to put the other in the position in which he would have been had the wrong never been committed. But delicts, as contrasted with them and with contracts, possess three peculiarities. The obligations which arise from them are independent, * and do not merely [* 17] modify obligations already subsisting; *they always involve dolus or culpa; and the remedies by which they are redressed are penal.*"

Dolus and *culpa.*

The Latin *dolus*, as a technical term, is not properly rendered by "fraud" in English; its meaning is much wider, and answers to what we generally signify by "unlawful intention." *Culpa* is exactly what we mean by "negligence" the falling short of that care and circumspection which is due from one man to another. The rules specially dealing with this branch have to define the measure of care which the law prescribes as due in the case in hand. The Roman conception of such rules, as worked out by the lawyers of the classical period, is excellently illustrated by the title of the Digest "ad legem Aquiliam," a storehouse of good sense and good law (for the principles are substantially the same as ours) deserving much more attention at the hands of English lawyers than it has ever received. It is to be observed that the Roman theory was built up on a foundation of archaic materials by no means unlike our own; the compensation of the civilized law stands instead of a primitive retaliation which was still recognized by the law of the Twelve Tables. If then we put aside the English treatment of rights of property as being accounted for by historical accidents, we find that the Roman conception of delict altogether supports (and by a perfectly independent analogy) the conception that appears really to underlie the English law of tort. Liability for delict, or civil wrong in the strict sense, is the result either of wilful injury to others, or wanton disregard of what is due to them (*dolus*), or of a failure to observe due care and caution which has similar though not intended or expected consequences (*culpa*). We have, moreover, apart from the law of trespass, an * exceptionally stringent [* 18] rule in certain cases where liability is attached to the befalling of harm without proof of either intention or negligence, as was mentioned under Group C of our provisional scheme. Such is the case of the landowner who keeps on his land an artificial reservoir of water, if the reservoir bursts and floods the lands of his neigh-

Liability *quasi ex delicto.*

bours. Not that it was wrong of him to have a reservoir there, but the law says he must do so at his own risk (*r*). This kind of liability has its parallel in Roman law, and the obligation is said to be not *ex delicto*, since true delict involves either *dolus* or *culpa*, but *quasi ex delicto* (*s*). Whether to avoid the difficulty of proving negligence, or in order to sharpen men's precaution in hazardous matters by not even allowing them, when harm is once done, to prove that they have been diligent, the mere fact of the mischief happening gives birth to the obligation. In the cases of carriers and innkeepers a similar liability is a very ancient part of our law. Whatever the original reason of it may have been as matter of history, we may be sure that it was something quite unlike the reasons of policy governing the modern class of cases of which Rylands *v.* Fletcher (*t*) is the type and leading authority; by such reasons, nevertheless, the rules must be defended as part of the modern law, if they can be defended at all.

Summary. On the whole, the result seems to be partly negative, but also not to be barren. It is hardly possible to frame a definition of a tort that will satisfy all the mean- [* 19] ings in * which the term has been used by persons and in documents of more or less authority in our law, and will at the same time not be wider than any of the authorities warrant. But it appears that this difficulty or impossibility is due to particular anomalies, and not to a total want of general principles. Disregarding those anomalies, we may try to sum up the normal idea of tort somewhat as follows:—

Tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related to harm suffered by a determinate person in the following ways:—

(a) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of.

(b) It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting.

(*r*) Ryland *v.* Fletcher, L. R. 3 H. L. 330.

(*s*) Austin's perverse and unintelligent criticism of this perfectly rational terminology has been treated with far more respect than it deserves. It is true, however, that the application of the term in the Institutes is not quite consistent or complete. See Mr. Moyle's notes on I. iv. 5.

(*t*) L. R. 3 H. L. 330.

(c) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented.

(d) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound, absolutely or within limits, to avoid or prevent.

A special duty of this kind may be (i) absolute, (ii) limited to answering for harm which is assignable to negligence.

In some positions a man becomes, so to speak, an insurer to the public against a certain risk, in others he warrants only that all has been done for safety that reasonable care can do.

Connected in principle with these special liabilities, but running through the whole subject, and of constant occurrence in almost every division of it, is the rule that a * master is answerable for the acts and de- [* 20] faults of his servants in the course of their employment.

This is indication rather than definition: but to have guiding principles indicated is something. We are entitled, and in a manner bound, not to rush forthwith into a detailed enumeration of the several classes of torts, but to seek first the common principles of liability, and then the common principles of immunity which are known as matter of justification and excuse. There are also special conditions and exceptions belonging only to particular branches, and to be considered, therefore, in the places appropriate to those branches.

A tort is the violation of an absolute duty for which there is a recovery in a civil action.

J. H. Dest Kay

[* 21] * CHAPTER II.

PRINCIPLES OF LIABILITY.

Want of generality in early law.

THERE is no express authority that I know of for stating as a general proposition of English law that it is a wrong to do wilful harm to one's neighbour without lawful justification or excuse. Neither is there any express authority for the general proposition that men must perform their contracts. Both principles are, in this generality of form or conception, modern, and there was a time when neither was true. Law begins not with authentic general principles, but with enumeration of particular remedies. There is no law of contracts in the modern lawyer's sense, only a list of certain kinds of agreements which may be enforced. Neither is there any law of delicts, but only a list of certain kinds of injury which have certain penalties assigned to them. Thus in the Anglo-Saxon laws we find minute assessments of the compensation due for hurts to every member of the human body, but there is no general prohibition of personal violence; and a like state of things appears in the fragments of the Twelve Tables (*a*). Whatever agreements are outside the spe- [* 22] cified forms are incapable * of enforcement; whatever injuries are not in the table of compensation must go without legal redress. The phrase *damnum sine iniuria*, which for the modern law is at best insignificant, has meaning and substance enough in such a system. Only that harm which falls within one of the specified categories of wrong-doing entitles the person aggrieved to a legal remedy.

General duty not to do harm in modern law.

Such is not the modern way of regarding legal duties or remedies. It is not only certain favoured kinds of agreement that are protected, but all agreements that satisfy certain general conditions are valid and binding, subject to exceptions which are themselves assignable to general principles of justice and policy. So we

(*a*) In Gaius iii. 223, 224, the contrast between the ancient law of fixed penalties and the modern law of damages assessed by judicial authority is clearly shown. The student will remember that, as regards the stage of development attained, the law of Justinian, and often that of Gaius, is far more modern than the English law of the Year-Books.

can be no longer satisfied in the region of tort with a mere enumeration of actionable injuries. The whole modern law of negligence, with its many developments, enforces the duty of fellow-citizens to observe in varying circumstances an appropriate measure of prudence to avoid causing harm to one another. The situations in which we are under no such duty appear at this day not as normal but as exceptional. A man cannot keep shop or walk into the street without being entitled to expect and bound to practise observance in this kind, as we shall more fully see hereafter. If there exists, then, a positive duty to avoid harm, much more must there exist, whether it be so expressed in the books or not, the negative duty of not doing wilful harm; subject, as all general duties must be subject, to the necessary exceptions. The three main heads of duty with which the law of torts is concerned—namely, to abstain from wilful injury, to respect the property of others, and to use due diligence to avoid causing harm to others—are all alike of a comprehensive nature. As our law of contract has been generalized by the doctrine of consideration and the action of *assumpsit*, * so has [* 23] our law of civil wrongs by the wide and various application of actions on the case (*b*).

Acts in breach of specific legal duty.

The commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury. Where the harm that ensues from the unlawful act or omission is the very kind of harm which it was the aim of the law to prevent (and this is the commonest case), the justice and necessity of this rule are manifest without further comment. Where a statute, for example, expressly lays upon a railway company the duty of fencing and watching a level crossing, this is a legislative declaration of the diligence to be required of the company in providing against harm to passengers using the road. Even if the mischief to be prevented is not such as an ordinary man would foresee as the probable consequence of disobedience, there is some default in the mere fact that the law is disobeyed (at any rate, a court of law cannot admit discussion on that point), and the defaulter must take the conse-

(*b*) The developed Roman law had either attained or was on the point of attaining a like generality of application. "Denique aliis pluribus modis admitti iniuriam manifestum est:" *J.* iv. 4, 1.

quences. The old-fashioned distinction between *mala prohibita* and *mala in se* is long since exploded. The simple omission, after notice, to perform a legal duty, may be a wilful offence within the meaning of a penal statute (*c*). As a matter of general policy, there are so many temptations to neglect public duties of all kinds for the sake of private interest that the addition of this quasi-penal sanction as a motive to their observance appears to be no bad thing. Many public duties, however, are wholly created by special statutes. In [* 24] * such cases it is not an universal proposition that a breach of the duty confers a private right of action on any and every person who suffers particular damage from it. The extent of the liabilities incident to a statutory duty must be ascertained from the scope and terms of the statute itself. Acts of Parliament often contain special provisions for enforcing the duties declared by them, and those provisions may be so framed as to exclude expressly or by implication any right of private suit (*d*). Also there is no cause of action where the damage complained of "is something totally apart from the object of the Act of Parliament," as being evidently outside the mischiefs which it was intended to prevent. What the legislature has declared to be wrongful for a definite purpose cannot be therefore treated as wrongful for another and different purpose (*e*).

Duty of respecting property.

As to the duty of respecting proprietary rights, we have already mentioned that it is an absolute one. Further illustration is reserved for the special treatment of that division of the subject.

Duties of diligence.

Then we have the general duty of using due care and caution. What is due care and caution under given circumstances has to be worked out in the special treatment of negligence. Here we may say that, generally speaking, the standard of duty is fixed by reference to what we should expect in the like case from a man of ordinary sense, knowledge, and prudence.

Assumption of skill.

Moreover, if the party has taken in hand the conduct of anything requiring special skill and knowledge,

(*c*) Gully *v.* Smith, 12 Q. B. D. 121.

(*d*) Atkinson *v.* Newcastle Waterworks Co. (1877) 2 Ex. Div. 441.

(*e*) Gorris *v.* Scott, (1874) L. R. 9 Ex. 125; Ward *v.* Hobbs (1878) 4 App. Ca. 13, 23.

we require * of him a competent measure of the [* 25] skill and knowledge usually found in persons who undertake such matters. And this is hardly an addition to the general rule; for a man of common sense knows wherein he is competent and wherein not, and does not take on himself things in which he is incompetent. If a man will drive a carriage, he is bound to have the ordinary competence of a coachman; if he will handle a ship, of a seaman; if he will treat a wound, of a surgeon; if he will lay bricks, of a bricklayer; and so in every case that can be put. Whoever takes on himself to exercise a craft holds himself out as possessing at least the common skill of that craft, and is answerable accordingly. If he fails, it is no excuse that he did the best he, being unskilled, actually could. He must be reasonably skilled at his peril. As the Romans put it, *imperitia culpae adnumeratur* (*f*). A good rider who goes out with a horse he had no cause to think ungovernable, and, notwithstanding all he can do to keep his horse in hand, is run away with by the horse, is not liable for what mischief the horse may do before it is brought under control again (*g*); but if a bad rider is run away with by a horse which a fairly good rider could have kept in order, he will be liable. An exception to this principle appears to be admissible in one uncommon but possible kind of circumstances, namely, where in emergency, and to avoid imminent risk, the conduct of something generally entrusted to skilled persons is taken by an unskilled person; as if the crew of a steamer were so disabled by tempest or sickness that the whole conduct of the vessel fell upon an engineer without knowledge of navigation, or a sailor * without knowledge of steam-engines. [* 26] So if the driver and stoker of a train were both disabled, say by sunstroke or lightning, the guard, who is presumably unskilled as concerns driving a locomotive, is evidently not bound to perform the driver's duties. So again, a person who is present at an accident requiring immediate provisional treatment, no skilled aid being on the spot, must act reasonably according to common knowledge if he acts at all; but he cannot be answerable to the same extent that a surgeon would be. There does not seem to be any distinct authority for such cases; but we may assume it to be law that no

Exception of necessity.

(*f*) D. 50. 17, de div. reg. iuris antiqui, 132; cf. D. 9. 2, ad legem Aquiliam, 8. Both passages are from Gaius.

(*g*) Hammack *v.* White (1862) 11 C. B. N. S. 588; 31 L. J. C. P. 129; Holmes *v.* Mather (1875) L. R. 10 Ex. 261.

more is required of a person in this kind of situation than to make a prudent and reasonable use of such skill, be it much or little, as he actually has.

Liability in relation to consequences of act or default.

We shall now consider for what consequences of his acts and defaults a man is liable. When complaint is made that one person has caused harm to another, the first question is whether his act (*h*) was really the cause of that harm in a sense upon which the law can take action. The harm or loss may be traceable to his act, but the connexion may be, in the accustomed phrase, too remote. The maxim "In iure non remota causa sed proxima spectatur" is Englished in Bacon's constantly cited gloss: "It were infinite for the law to judge the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree" (*i*). Liability must be founded on an [* 27] act which is the "immediate cause" of * harm or of injury to a right. Again, there may have been an undoubted wrong, but it may be doubted how much of the harm that ensues is related to the wrongful act as its "immediate cause," and therefore is to be counted in estimating the wrong-doer's liability. The distinction of proximate from remote consequences is needful first to ascertain whether there is any liability at all, and then, if it is established that wrong has been committed, to settle the footing on which compensation for the wrong is to be awarded. The normal form of compensation for wrongs (and also for breaches of contract) in the procedure of our Superior Courts of common law has been the fixing of damages in money by a jury under the direction of a judge. It is the duty of the judge (*k*) to explain to the jurors, as a matter of law, the footing upon which they should calculate the damages if their verdict is for the plaintiff. This footing or scheme is called the "measure of damages." Thus, in the common case of a breach of contract for the sale of goods, the measure of damages is the difference between the price named in the contract and the market value of the like goods at the time when the contract was

Measure of damages.

(*h*) For shortness' sake I shall often use the word "act" alone as equivalent to "act or default."

(*i*) Maxims of the Law, Reg. 1. It is remarkable that not one of the examples adduced by Bacon belongs to the law of torts, or raises a question of the measure of damages. There could be no stronger illustration of the extremely modern character of the whole subject as now understood.

(*k*) Hadley *v.* Baxendale (1854) 9 Ex. 341; 23 L. J. Ex. 179.

broken. In cases of contract there is no trouble in separating the question whether a contract has been made and broken from the question what is the proper measure of damages (*l*). But in cases of tort the primary question of liability may itself depend, and it often does, on the nearness or remoteness of the harm complained of. Except where we have an absolute duty and an act which manifestly violates it, no clear line can be drawn between the rule of liability and the rule of * compensation. The measure of damages, [* 28] a matter appearing at first sight to belong to the law of remedies more than of "antecedent rights," constantly involves, in the field of torts, points that are in truth of the very substance of the law. It is under the head of "measure of damages" that these for the most part occur in practice, and are familiar to lawyers; but their real connexion with the leading principles of the subject must not be overlooked here.

Meaning of "immediate cause."

The meaning of the term "immediate cause" is not capable of perfect or general definition. Even if it had an ascertainable logical meaning, which is more than doubtful, it would not follow that the legal meaning is the same. In fact, our maxim only points out that some consequences are held too remote to be counted. What is the test of remoteness we still have to inquire. The view which I shall endeavour to justify is that, for the purpose of civil liability, those consequences, and those only, are deemed "immediate," "proximate," or, to anticipate a little, "natural and probable," which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct. This is only where the particular consequence is not known to have been intended or foreseen by the actor. If proof of that be forthcoming, whether the consequence was "immediate" or not does not matter. That which a man actually foresees is to him, at all events, natural and probable.

Liability of consequences of wilful act:

In the case of wilful wrong-doing we have an act intended to do harm, and harm done by it. The inference of liability from such an act (given the general rule, and assuming no just cause of exception to be pre-

(*l*) Whether it is practically worth while to sue on a contract must, indeed, often turn on the measure of damages. But this need not concern us here.

[* 29] sent) may * seem a plain matter. But even in this first case it is not so plain as it seems. We have to consider the relation of that which the wrong-doer intends to the events which in fact are brought to pass by his deed; a relation which is not constant, nor always evident. A man strikes at another with his fist or a stick, and the blow takes effect as he meant it to do. Here the connexion of act and consequence is plain enough, and the wrongful actor is liable for the resulting hurt. But the consequence may be more than was intended, or different. And it may be different either in respect of the event, or of the person affected. Nym quarrels with Pistol and knocks him down. The blow is not serious in itself, but Pistol falls on a heap of stones which cut and bruise him. Or they are on the bank of a deep ditch; Nym does not mean to put Pistol into the ditch, but his blow throws Pistol off his balance, whereby Pistol does fall into the ditch, and his clothes are spoilt. These are simple cases where a different consequence from that which was intended happens as an incident of the same action. Again, one of Jack Cade's men throws a stone at an alderman. The stone misses the alderman, but strikes and breaks a jug of beer which another citizen is carrying. Or Nym and Bardolph agree to waylay and beat Pistol after dark. Poins comes along the road at the time and place where they expected Pistol; and, taking him for Pistol, Bardolph and Nym seize and beat Poins. Clearly, just as much wrong is done to Poins, and he has the same claim to redress, as if Bardolph and Nym meant to beat Poins, and not Pistol (*m*). Or, to take an actual [* 30] and well-known case * in our books (*n*), Shepherd throws a lighted squib into a building full of people, doubtless intending it to do mischief of some kind. It falls near a person who, by an instant and natural act of self-protection, casts it from him. A

it extends to some consequences not intended.

(*m*) In criminal law there is some difficulty in the case of attempted personal offences. There is no doubt that if A. shoots and kills or wounds X., under the belief that the man he shoots at is Z., he is in no way excused by the mistake, and cannot be heard to say that he had no unlawful intention as to X.: R. *v.* Smith (1855) Dears. 559. But if he misses, it seems doubtful whether he can be said to have attempted to kill either X. or Z. Cf. R. *v.* Latimer (1886) 17 Q. B. D. 359.

(*n*) Scott *v.* Shepherd, 2 W. Bl. 892; and in 1 Sm. L. C. No doubt was entertained of Shepherd's liability; the only question being in what form of action he was liable. The inference of wrongful intention is in this case about as obvious as it can be; it was, however, not necessary, squib-throwing, as Nares J. pointed out, having been declared a nuisance by statute.

third person again does the same. In this third flight the squib meets with Scott, strikes him in the face, and explodes, destroying the sight of one eye. Shepherd neither threw the squib at Scott, nor intended such grave harm to any one; but he is none the less liable to Scott. And so in the other cases put, it is clear law that the wrong-doer is liable to make good the consequences, and it is likewise obvious to common sense that he ought to be. He went about to do harm, and having begun an act of wrongful mischief, he cannot stop the risk at his pleasure, nor confine it to the precise objects he laid out, but must abide it fully and to the end.

"Natural consequences:" relation of the rule to the actor's intention.

This principle is commonly expressed in the maxim that "a man is presumed to intend the natural consequences of his acts:" a proposition which, with due explanation and within due limits, is acceptable, but which in itself is ambiguous. To start from the simplest case, we may know that the man intended to produce a certain consequence, and did produce it. And we may have independent proof of the intention; as if he announced it beforehand by threats or boasting of what he would do. But oftentimes the act itself is the chief or sole proof of the intention with which it is done. If we see Nym walk up to Pistol and knock him down, we infer that Pistol's fall was intended by Nym * as the consequence of the blow. We may be [* 31] mistaken in this judgment. Possibly Nym is walking in his sleep, and has no real intention at all, at any rate none which can be imputed to Nym awake. But we do naturally infer intention, and the chances are greatly in favour of our being right. So nobody could doubt that when Shepherd threw a lighted squib into a crowded place he expected and meant mischief of some kind to be done by it. Thus far it is a real inference, not a presumption properly so called. Now take the case of Nym knocking Pistol over a bank into the ditch. We will suppose there is nothing (as there well may be nothing but Nym's own worthless assertion) to show whether Nym knew the ditch was there; or, if he did know, whether he meant Pistol to fall into it. These questions are like enough to be insoluble. How shall we deal with them? We shall disregard them. From Nym's point of view his purpose may have been simply to knock Pistol down, or to knock him into the ditch also; from Pistol's point of view the grievance is the same. The wrong-doer cannot call on us to perform a nice discrimination of that which is willed by him from

that which is only consequential on the strictly wilful wrong. We say that intention is presumed, meaning that it does not matter whether intention can be proved or not; nay, more, it would in the majority of cases make no difference if the wrong-doer could disprove it. Such an explanation as this—"I did mean to knock you down, but I meant you not to fall into the ditch"—would, even if believed, be the lamest of apologies, and it would no less be a vain excuse in law.

Meaning of "natural and probable" consequence.

The habit by which we speak of presumption comes probably from the time when, inasmuch as parties could not give evidence, intention could hardly ever be matter of direct proof. Under the old system of pleading [* 32] and * procedure, Brian C. J. might well say, "the thought of man is not triable" (*o*). Still there is more in our maxim than this. For although we do not care whether the man intended the particular consequence or not, we have in mind such consequences as he might have intended, or, without exactly intending them, contemplated as possible; so that it would not be absurd to infer as a fact that he either did mean them to ensue, or recklessly put aside the risk of some such consequences ensuing. This is the limit introduced by such terms as "natural"—or more fully, "natural and probable"—consequence (*p*). What is natural and probable in this sense is commonly, but not always obvious. There are consequences which no man could, with common sense and observation, help foreseeing. There are others which no human prudence could have foreseen. Between these extremes is a middle region of various probabilities divided by an ideal boundary which will be differently fixed by different opinions; and as we approach this boundary the difficulties increase. There is a point where subsequent events are, according to common understanding, the consequence not of the first wrongful act at all, but of something else that has happened in the meanwhile, though, but for the first act, the event

(*o*) Year-Book 17 Edw. IV. 1, translated in Blackburn on Sale, at p. 193 in 1st ed., 261 in 2nd ed. by Graham.

(*p*) "Normal, or likely or probable of occurrence in the ordinary course of things, would perhaps be the better expression:" Grove J. in Smith *v.* Green, 1 C. P. D. at p. 96. But what is normal or likely to a specialist may not be normal or likely to a plain man's knowledge and experience.

might or could not have been what it was (*q*). But that point cannot be defined by science or philosophy; and even if it * could, the definition would not [* 33] be of much use for the guidance of juries. If English law seems vague on these questions, it is because, in the analysis made necessary by the separation of findings of fact from the conclusions of law, it has grappled more closely with the inherent vagueness of facts than any other system. We may now take some illustrations of the rule of "natural and probable consequences" as it is generally accepted. In whatever form we state it, we must remember that it is not a logical definition, but only a guide to the exercise of common sense. The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause.

Vandenburgh *v.* Truax.

In Vandenburgh *v.* Truax (*r*), decided by the Supreme Court of New York in 1847, the plaintiff's servant and the defendant quarrelled in the street. The defendant took hold of the servant, who broke loose from him and ran away; "the defendant took up a pick-axe and followed the boy, who fled into the plaintiff's store, and the defendant pursued him there, with the pick-axe in his hand." In running behind the counter for shelter the servant knocked out the faucet from a cask of wine, whereby the wine ran out and was lost. Here the defendant (whatever the merits of the original quarrel) was clearly a wrong-doer in pursuing the boy; the plaintiff's house was a natural place for his servant to take refuge in, and it was also natural that the servant, "fleeing for his life from a man in hot pursuit armed with a deadly weapon," should, in his hasty movements, do some damage to the plaintiff's property in the shop.

Guille *v.* Swan.

* There was a curious earlier case in the [* 34] same State (*s*), where one Guille, after going up in a balloon, came down in Swan's garden. A crowd of people, attracted by the balloon, broke into the garden

(*q*) Thus Quain J. said (Sneesby *v.* L. & Y. Rail. Co., L. R. 9 Q. B. at p. 268): "In tort the defendant is liable for all the consequences of his illegal act, where they are not so remote as to have no direct connexion with the act, as by the lapse of time for instance."

(*r*) 4 Denio, 464. The decision is of course not binding except in the State of New York; but it seems to be generally accepted as good law.

(*s*) Guille *v.* Swan (1822) 19 Johns. 381.

and trod down the vegetables and flowers. Swan's descent was in itself plainly a trespass; and he was held liable not only for the damage done by the balloon itself but for what was done by the crowd. "If his descent under such circumstances would, ordinarily and naturally, draw a crowd of people about him, either from curiosity, or for the purpose of rescuing him from a perilous situation; all this he ought to have foreseen, and must be responsible for" (*t*). In both these cases the squib case was commented and relied on. Similarly it has many times been said, and it is undoubted law, that if a man lets loose a dangerous animal in an inhabited place he is liable for all the mischief it may do.

Liability for consequences of trespass.

The balloon case illustrates what was observed in the first chapter on the place of trespass in the law of torts. The trespass was not in the common sense wilful; Guille certainly did not mean to come down into Swan's garden, which he did, in fact, with some danger to himself. But a man who goes up in a balloon must know that he has to come down somewhere, and that he cannot be sure of coming down in a place which he is entitled to use for that purpose, or where his descent will cause no damage and excite no objection. Guille's liability was accordingly the same as if the balloon had been under his control, and he had guided it into Swan's garden. If balloons were as manageable as a vessel at sea, and by some accident which could not be [* 35] ascribed to any fault of the traveller the * steering apparatus got out of order, and so the balloon drifted into a neighbour's garden, the result might be different. So, if a landslip carries away my land and house from a hillside on which the house is built, and myself in the house, and leaves all overlying a neighbour's field in the valley, it may, perhaps, be said that I am technically a trespasser (though it seems not, as there is no act of mine at all: it is like the falling on my neighbour's land of fruit from my tree), but anyhow I am not liable for the damage to my neighbour's land. But where trespass to property is committed by a voluntary act, known or not known to be an infringement of another's right, there the trespasser, as regards liability for consequences, is on the same footing as a wilful wrong-doer.

(*t*) Per Spencer C. J. It appeared that the defendant (plaintiff in error) had called for help; but this was treated as immaterial.

A simple example of a consequence too remote to be ground for liability, though it was part of the incidents following on a wrongful act, is afforded by Glover *v.* London and South Western Railway Company (*u*). The plaintiff, being a passenger on the railway, was charged by the company's ticket collector, wrongly as it turned out, with not having a ticket, and was removed from the train by the company's servants with no more force than was necessary for the purpose. He left a pair of race-glasses in the carriage, which were lost; and he sought to hold the company liable not only for the personal assault committed by taking him out of the train, but for the value of these glasses. The Court held without difficulty that the loss was not the "necessary consequence" or "immediate result" of the wrongful act: for there was nothing to show that the plaintiff was prevented from taking his glasses with him, or that he would not have got them if after leaving the carriage he had asked for them.

Consequence too remote: Glover *v.* L. & S. W. R. Co.

* In criminal law the question not unfre- [* 36] quently occurs, on a charge of murder or manslaughter, whether a certain act or neglect was the "immediate cause" of the death of the deceased person. We shall not enter here upon the cases on this head; but the comparison of them will be found interesting. They are collected by Mr. Justice Stephen (*x*).

Question of what is killing in criminal law.

The doctrine of "natural and probable consequence" is most clearly illustrated, however, in the law of negligence. For there the substance of the wrong itself is failure to act with due foresight: it has been defined as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do" (*y*). Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjuncture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behaviour we

Liability for negligence depends on probability of consequence, *i. e.* its capability of being foreseen by a reasonable man.

(*u*) L. R. 3 Q. B. 25.

(*x*) Digest of the Criminal Law, Arts. 219, 220.

(*y*) Alderson B. in Blyth *v.* Birmingham Waterworks Co. (1856) 11 Ex. 781; 25 L. J. Ex. 212. This is not a complete definition, since a man is not liable for even wilful omission without some antecedent ground of duty. But of that hereafter.

are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the de- [* 37] fendant's place should have * foreseen as likely to happen, there is no wrong and no liability. And the statement proposed, though not positively laid down, in Greenland *v.* Chaplin (*z*), namely, "that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur," appears to contain the only rule tenable on principle where the liability is founded solely on negligence. "Mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated," may be the ground of legal compensation under some rule of exceptional severity, and such rules, for various reasons, exist; but under an intelligible rule of due care and caution it cannot be taken into account.

Examples: Hill *v.* New River Co.

We shall now give examples on either side of the line.

In Hill *v.* New River Company (*a*), the defendant company had in the course of their works caused a stream of water to spout up in the middle of a public road, without making any provision, such as fencing or watching it for the safety of the persons using the highway. As the plaintiff's horses and carriage were being driven along the road, the horses shied at the water, dashed across the road, and fell into an open excavation by the roadside which had been made by persons and for purposes unconnected with the water company. It was argued that the immediate cause of the injuries to man, horses, and carriage ensuing upon this fall was not the unlawful act of the water company, but the neglect of the contractors who had made the cutting in leaving it open and unfenced. But the Court held that [* 38] * the "proximate cause" was "the first negligent act which drove the carriage and horses into the excavation." In fact, it was a natural consequence that

(*z*) Per Pollock C. B. (1850) 5 Ex. at p. 248.

(*a*) 9 B. & S. 303 (1868); cp. Harris *v.* Mobbs (Denman J. 1878) 3 Ex. D. 268, which, perhaps, goes a step farther.

frightened horses should bolt off the road; it could not be foreseen exactly where they would go off, or what they might run against or fall into. But some such harm as did happen was probable enough, and it was immaterial for the purpose in hand whether the actual state of the ground was temporary or permanent, the work of nature or of man. If the carriage had gone into a river, or over an embankment, or down a precipice, it would scarcely have been possible to raise the doubt.

Williams *v.* Great Western Railway Company (*b*) is a stronger case, if not an extreme one. There were on a portion of the company's line in Denbighshire two level crossings near one another, the railway meeting a carriage-road in one place and a footpath (which branched off from the road) in the other. It was the duty of the company under certain Acts to have gates and a watchman at the road crossing, and a gate or stile at the footpath crossing; but none of these things had been done. Williams *v.* G. W. R. Co.

"On the 22nd December, 1871, the plaintiff, a child of four and a-half years old, was found lying on the rails by the footpath, with one foot severed from his body. There was no evidence to show how the child had come there, beyond this, that he had been sent on an errand a few minutes before from the cottage where he lived, which lay by the roadside, at about 300 yards distance from the railway, and farther from it than the point where the footpath diverged from the road. It was suggested on the part of the defendants that he had gone along the road, and then, * reaching [* 39] the railway, had strayed down the line; and on the part of the plaintiff, that he had gone along the open footpath, and was crossing the line when he was knocked down and injured by the passing train."

On these facts it was held that there was evidence proper to go to a jury, and on which they might reasonably find that the accident to the child was caused by the railway company's omission to provide a gate or stile. "One at least of the objects for which a gate or stile is required is to warn people of what is before them, and to make them pause before reaching a dangerous place like a railroad" (*c*).

(*b*) L. R. 9 Ex. 157 (1874). Cp. Hays *v.* Michigan Central Rail Co. (1883) 111 U. S. 228.

(*c*) Amphlett B. at p. 162.

Bailiffs of Romney Marsh *v.* Trinity House.

In Bailiffs of Romney Marsh *v.* Trinity House (*d*), a Trinity House cutter had by negligent navigation struck on a shoal about three quarters of a mile outside the plaintiff's sea-wall. Becoming unmanageable, the vessel was inevitably driven by strong wind and tide against the sea-wall, and did much damage to the wall. It was held without difficulty that the Corporation of the Trinity House was liable (under the ordinary rule of a master's responsibility for his servants, of which hereafter) for this damage, as being the direct consequence of the first default which rendered the vessel unmanageable.

Lynch *v.* Nurdin.

Something like this, but not so simple, was Lynch *v.* Nurdin (*e*), where the owner of a horse and cart left them unwatched in the street; some children came up and began playing about the cart, and as one of them, the [* 40] plaintiff in * the cause, was climbing in the cart another pulled the horse's bridle, the horse moved on, and the plaintiff fell down under the wheel of the cart and was hurt. The owner who had left the cart and horse unattended was held liable for this injury. The Court thought it strictly within the province of a jury "to pronounce on all the circumstances, whether the defendant's conduct was wanting in ordinary care, and the harm to the plaintiff such a result of it as might have been expected" (*f*).

Contrasted cases of non-liability and liability:

It will be seen that on the whole the disposition of

(*d*) L. R. 5 Ex. 204 (1870); in Ex. Ch. L. R. 7 Ex. 247 (1872). This comes near the case of letting loose a dangerous animal; a drifting vessel is in itself a dangerous thing. In The George and Richard, L. R. 3 A. & E. 466, a brig by negligent navigation ran into a bark, and disabled her; the bark was driven on shore; held that the owners of the brig were liable for injury ensuing from the wreck of the bark to persons on board her.

(*e*) Q. B. 29; 10 L. J. Q. B. 73 (1841); cp. Clark *v.* Chambers, 3 Q. B. D. at p. 331.

(*f*) This case was relied on in Massachusetts in Powell *v.* Deveney (1849) 3 Cush. 300, where the defendant's truck had, contrary to local regulations, been left out in the street for the night, the shafts being shored up and projecting into the road: a second truck was similarly placed on the opposite side of the road: the driver of a third truck, endeavouring with due caution, as it was found, to drive past through the narrowed fairway thus left, struck the shafts of the defendant's truck, which whirled round and struck and injured the plaintiff, who was on the sidewalk. Held, the defendant was liable. If the case had been that the shafts of the truck remained on the sidewalk, and the plaintiff afterwards stumbled on them in the dark, it would be an almost exact parallel to Clark *v.* Chambers (3 Q. B. D. 327; see below).

the Courts has been to extend rather than to narrow the range of "natural and probable consequences." A pair of cases at first sight pretty much alike in their facts, but in one of which the claim succeeded, while in the other it failed, will show where the line is drawn. If a horse escapes into a public road and kicks a person who is lawfully on the road, its owner is not liable unless he knew the horse to be vicious (*g*). He was bound indeed to keep his horse from straying, but it is not an ordinary consequence of a horse being loose on a road that it should kick human beings without provocation. The rule is different however if a horse by reason of a defective gate strays out into the road * but into an adjoining field where there are [* 41] other horses, and kicks one of those horses. In that case the person whose duty it was to maintain the gate is liable to the owner of the injured horse (*h*). Cox *v.* Burbidge, Lee *v.* Riley.

The leading case of Metropolitan R. Co. *v.* Jackson (*i*) is in truth of this class, though the problem arose and was considered, in form, upon the question whether there was any evidence of negligence. The plaintiff was a passenger in a carriage already over full. As the train was stopping at a station, he stood up to resist yet other persons who had opened the door and tried to press in. While he was thus standing, and the door was open, the train moved on. He laid his hand on the door-lintel for support, and at the same moment a porter came up, turned off the intruders, and quickly shut the door in the usual manner. The plaintiff's thumb was caught by the door and crushed. After much difference of opinion in the courts below, mainly due to a too literal following of certain previous authorities, the House of Lords unanimously held that assuming the failure to prevent overcrowding to be negligence on the company's part, the hurt suffered by the plaintiff was not nearly or certainly enough connected with it to give him a cause of action. It was an accident which might no less have happened if the carriage had not been overcrowded at all. He would have made a seat if car was not overcrowded. Metropolitan R. Co. *v.* Jackson.

Unusual conditions brought about by severe frost Nonliability for con-

(*g*) Cox *v.* Burbidge (1863) 13 C. B. N. S. 430; 32 L. J. C. P. 89.

(*h*) Lee *v.* Riley (1865) 18 C. B. N. S. 722; 34 L. J. C. P. 212. Both decisions were unanimous, and two judges (Erle C. J. and Keating J.) took part in both. Cp. Ellis *v.* Loftus Iron Co., L. R. 10 C. P. 10.

(*i*) 3 App. Ca. 193 (1877).

sequences of unusual state of things: Blyth *v.* Birmingham Waterworks Co.

have more than once been the occasion of accidents on which untenable claims for compensation have been [* 42] founded, the * Courts holding that the mishap was not such as the party charged with causing it by his negligence could reasonably be expected to provide against. In the memorable " Crimean winter " of 1854-5 a fire plug attached to one of the mains of the Birmingham Waterworks Company was deranged by the frost, the expansion of superficial ice forcing out the plug, as it afterwards seemed, and the water from the main being dammed by incrusted ice and snow above. The escaping water found its way through the ground into the cellar of a private house, and the occupier sought to recover from the company for the damage. The Court held that the accident was manifestly an extraordinary one, and beyond any such foresight as could be reasonably required (*k*). Here nothing was alleged as constituting a wrong on the company's part beyond the mere fact that they did not take extraordinary precautions.

Sharp *v.* Powell.

The later case of Sharp *v.* Powell (*l*) goes farther, as the story begins with an act on the defendant's part which was a clear breach of the law. He caused his van to be washed in a public street, contrary to the Metropolitan Police Act. The water ran down a gutter, and would in fact (*m*) (but for a hard frost which had then set in for some time) have run harmlessly down a grating into the sewer, at a corner some twenty-five yards from where the van was washed. As it happened, the grating was frozen over, the water spread out and froze [* 43] into a sheet of ice, * and a led horse of the plaintiff's slipped thereon and broke its knee. It did not appear that the defendant or his servants knew of the stoppage of the grating. The Court thought the damage was not " within the ordinary consequences " (*n*) of such an act as the defendant's, not " one which the defendant could fairly be expected to anticipate as likely to ensue from his act " (*o*) : he " could not reasonably

(*k*) Blyth *v.* Birmingham Waterworks Co. (1856) 11 Ex. 781; 25 L. J. Ex. 212. The question was not really of remoteness of damage, but whether there was any evidence of negligence at all: nevertheless the case is instructive for comparison with the others here cited. Cp. Mayne on Damages, Preface to the first edition.

(*l*) L. R. 7 C. P. 253 (1872).

(*m*) So the Court found, having power to draw inferences of fact.

(*n*) Grove J.

(*o*) Keating J.

be expected to foresee that the water would accumulate and freeze at the spot where the accident happened" (*p*).

Some doubt appears to be cast on the rule thus laid down—which, it is submitted, is the right one—by what was said a few years later in Clark *v.* Chambers (*q*), though not by the decision itself. This case raises the question whether the liability of a wrong-doer may not extend even to remote and unlikely consequences where the original wrong is a wilful trespass, or consists in the unlawful or careless use of a dangerous instrument. The main facts were as follows :—

Question, if the same rule holds for consequences of wilful wrong: Clark *v.* Chambers.

1. The defendant without authority set a barrier, partly armed with spikes (chevaux-de-frise), across a road subject to other persons' rights of way. An opening was at most times left in the middle of the barrier, and was there at the time when the mischief happened.

2. The plaintiff went after dark along this road and through the opening, by the invitation of the occupier of one of the houses to which the right of using the road belonged, and in order to go to that house.

3. Some one, not the defendant or any one authorized by him, had removed one of the chevaux-de-frise barriers, and set it on end on the footpath. It was suggested, but not * proved, that this was done by [* 44] a person entitled to use the road, in exercise of his right to remove the unlawful obstruction.

4. Returning later in the evening from his friend's house, the plaintiff, after safely passing through the central opening above mentioned, turned on to the footpath. He there came against the chevaux-de-frise thus displaced (which he could not see, the night being very dark), and one of the spikes put out his eye.

After a verdict for the plaintiff the case was reserved for further consideration, and the Court (*r*) held that the damage was nearly enough connected with the defendant's first wrongful act—namely, obstructing the road with instruments dangerous to people lawfully using it—for the plaintiff to be entitled to judgment. It is not obvious why and how, if the consequence in Clark *v.* Chambers was natural and probable enough to

(*p*) Bovill C. J.

(*q*) 3 Q. B. D. 327 (1878).

(*r*) Cockburn C. J. and Manisty J. The point chiefly argued for the defendant seems to have been that the intervention of a third person's act prevented him from being liable : a position which is clearly untenable (see Scott *v.* Shepherd); but the judgment is of wider scope.

justify a verdict for the plaintiff, that in Sharp *v.* Powell was too remote to be submitted to a jury at all. The Court did not dispute the correctness of the judgments in Sharp *v.* Powell " as applicable to the circumstances of the particular case;" but their final observations (*s*) certainly tend to the opinion that in a case of active wrong-doing the rule is different. Such an opinion, it is submitted, is against the general weight of authority, and against the principles underlying the authorities (*t*). However, their conclusion may be supported, and may have been to some extent determined, by the [* 45] * special rule imposing the duty of what has been called " consummate caution " on persons dealing with dangerous instruments.

Consequences natural in kind though not in circumstance.

Perhaps the real solution is that here, as in Hill *v.* New River Co., the kind of harm which in fact happened might have been expected, though the precise manner in which it happened was determined by an extraneous accident. If in this case the spikes had not been disturbed, and the plaintiff had in the dark missed the free space left in the barrier, and run against the spiked part of it, the defendant's liability would not have been disputed. As it was, the obstruction was not exactly where the defendant had put it, but still it was an obstruction to that road which had been wrongfully brought there by him. He had put it in the plaintiff's way no less than Shepherd put his squib in the way of striking Scott; whereas in Sharp *v.* Powell the mischief was not of a kind which the defendant had any reason to foresee.

The turn taken by the discussion in Clark *v.* Chambers was, in this view, unnecessary, and it is to be regretted that a considered judgment was delivered in a form tending to unsettle an accepted rule without putting anything definite in its place. On the whole, we submit that, whether Clark *v.* Chambers can stand with it or not, both principle and the current of authority concur to maintain the law as declared in Sharp *v.* Powell.

(*s*) 3 Q. B. D. at p. 338.

(*t*) Compare the cases on slander collected in the notes to Vicars *v.* Wilcocks, 2 Sm. L. C. Compare also, as to consequential liability for disregard of statutory provisions, Gorris *v.* Scott, L. R. 9 Ex. 125.

* CHAPTER III. [* 46]

PERSONS AFFECTED BY TORTS.

1.—*Limitations of Personal Capacity*

Personal status, as a rule, immaterial in law of tort: but capacity in fact may be material.

In the law of contract various grounds of personal disability have to be considered with some care. Infants, married women, lunatics, are in different degrees and for different reasons incapable of the duties and rights arising out of contracts. In the law of tort it is otherwise. Generally speaking, there is no limit to personal capacity either in becoming liable for civil injuries, or in the power of obtaining redress for them. It seems on principle that where a particular intention, knowledge, or state of mind in the person charged as a wrong-doer is an element, as it sometimes is, in constituting the alleged wrong, the age and mental capacity of the person may and should be taken into account (along with other relevant circumstances) in order to ascertain as a fact whether that intention, knowledge, or state of mind was present. But in every case it would be a question of fact, and no exception to the general rule would be established or propounded (*a*). An idiot would scarcely be held answerable for incoherent words of vituperation, though, if uttered by a sane man * they might be slander. But this [* 47] would not help a monomaniac who should write libellous post-cards to all the people who had refused or neglected, say to supply him with funds to recover the Crown of England. The amount of damages recovered might be reduced by reason of the evident insignificance of such libels; but that would be all. Again, a mere child could not be held accountable for not using the discretion of a man; but an infant is certainly liable for all wrongs of omission as well as of commission in matter where he was, in the common phrase, old enough to

(*a*) Ulpian, in D. 9, 2, ad leg. Aquil. 5, § 2. Quaerimus, si furiosus damnum dederit, an legis Aquiliae actio sit? Et Pegasus negavit: quae enim in eo culpa sit, cum suae mentis non sit? Et hoc est verissimum. . . . Quod si impubes id fecerit, Labeo ait, quia furti tenetur, teneri et Aquilia eum; et hoc puto verum, si sit iam iniuriae capax.

know better. It is a matter of common sense, just as we do not expect of a blind man the same actions or readiness to act as of a seeing man.

Partial or apparent exceptions:

There exist partial exceptions, however, in the case of convicts and alien enemies, and apparent exceptions as to infants and married women.

Convicts and alien enemies.

A convicted felon whose sentence is in force and unexpired, and who is not "lawfully at large under any licence," cannot sue "for the recovery of any property, debt or damage whatsoever" (*b*). An alien enemy cannot sue in his own right in any English court. Nor is the operation of the Statute of Limitation suspended, it seems, by the personal disability (*c*).

Infants: contract not to be indirectly enforced by suing in tort.

With regard to infants, there were certain cases under the old system of pleading in which there was an option to sue for breach of contract or for a tort. In such a case an infant could not be made liable for what was in truth a breach of contract by framing the action *ex* [* 48] *delicto*. "You * cannot convert a contract into a tort to enable you to sue an infant: Jennings *v.* Rundall" (*d*). And the principle goes to this extent, that no action lies against an infant for a fraud whereby he has induced a person to contract with him, such as a false statement that he is of full age (*e*).

Limits of the rule: independent wrongs.

But where an infant commits a wrong of which a contract, or the obtaining of something under a contract, is the occasion, but only the occasion, he is liable. In Burnard *v.* Haggis (*f*), the defendant in the County Court, an infant undergraduate, hired a horse for riding on the express condition that it was not to be used for jumping; he went out with a friend who rode this horse by his desire, and, making a cut across country, they jumped divers hedges and ditches, and the horse staked

(*b*) 33 & 34 Vic. c. 23, ss. 8, 30. Can he sue for an injunction? Or for a dissolution of marriage or judicial separation?

(*c*) See De Wahl *v.* Braune (1856) 1 H. & N. 178; 25 L. J. Ex. 343 (alien enemy: the law must be the same of a convict).

(*d*) 8 T. R. 335, thus cited by Parke B., Fairhurst *v.* Liverpool Adelphi Loan Association (1854) 9 Ex. 422; 23 L. J. Ex. 163.

(*e*) Johnson *v.* Pie, 1 Sid. 258, &c. See the report fully cited by Knight Bruce V.-C. (1847) in Stikeman *v.* Dawson, 1 De G. & Sm. at p. 113; cp. the remarks at p. 110.

(*f*) 14 C. B. N. S. 45; 32 L. J. C. P. 189 (1863). The wrongful act was such as to determine the bailment. Compare the authorities on conversion, Ch. IX. below.

itself on a fence and was fatally injured. Having thus caused the horse to be used in a manner wholly unauthorized by its owner, the defendant was held to have committed a mere trespass or "independent tort," for which he was liable to the owner apart from any question of contract, just as if he had mounted and ridden the horse without hiring or leave.

Infant shall not take advantage of his own fraud.

Also it has been established by various decisions in the Court of Chancery that "an infant cannot take advantage of his own fraud:" that is, he may be compelled to specific restitution, where that is possible, of anything he has obtained by deceit, nor can he hold other persons liable for acts done on the faith of his false statement, which would * have been duly done [* 49] if the statement had been true (*g*). Thus, where an infant had obtained a lease of a furnished house by representing himself as a responsible person and of full age, the lease was declared void, and the lessor to be entitled to delivery of possession, and to an injunction to restrain the lessee from dealing with the furniture and effects, but not to damages for use and occupation (*g*).

Married women: the common law.

As to married women, a married woman was by the common law incapable of binding herself by contract, and therefore, like an infant, she could not be made liable as for a wrong in an action for deceit or the like, when this would have in substance amounted to making her liable on a contract (*h*). In other cases of wrong she was not under any disability, nor had she any immunity; but she had to sue and be sued jointly with her husband, inasmuch as her property was the husband's; and the husband got the benefit of a favourable judgment and was liable to the consequences of an adverse one.

Married Women's Property Act, 1882.

Since the Married Women's Property Act, 1882, a married woman can acquire and hold separate property in her own name, and sue and be sued without joining her husband; if she is sued alone, damages and costs recovered against her are payable out of her separate

---

(*g*) Lemprière *v.* Lange (1879) 12 Ch. D. 675; and see other cases in the writer's "Principles of Contract," pp. 76, 77, 4th ed.

(*h*) Fairhurst *v.* Liverpool Adelphi Loan Association (1854) 9 Ex. 422; 23 L. J. Ex. 163.

property (*i*). She may sue her own husband, if necessary, "for the protection and security of her own separate property;" but otherwise actions for a tort between hus- [* 50] band and wife * cannot be entertained (*j*). That is, a wife may sue her husband in an action which under the old forms of pleading would have been trover for the recovery of her goods, or for a trespass or nuisance to land held by her as her separate property; but she may not sue him in a civil action for a personal wrong, such as assault, libel, or injury by negligence. Divorce does not enable the divorced wife to sue her husband for a personal tort committed during the coverture (*k*). There is not anything in the Act to prevent a husband and wife from suing or being sued jointly according to the old practice; the husband is not relieved from liability for wrongs committed by the wife during coverture, and may still be joined as a defendant at need. If it were not so, a married woman having no separate property might commit wrongs with impunity (*l*). If the husband and wife are now jointly sued for the wife's wrong, and execution issues against the husband's property, a question may possibly be raised whether the husband is entitled to indemnity from the wife's separate property, if in fact she has any (*m*).

Common law liability of infants and married women

There is some authority for the doctrine that by the common law both infants (*n*) and married women (*o*) are liable only for "actual torts" such as trespass, [* 51] which were * formerly laid in pleading as *contra pacem*, and are not in any case liable for torts in

(*i*) 45 & 46 Vict. c. 75, s. 1. The right of action given by the statute applies to a cause of action which arose before it came into operation: Weldon *v.* Winslow (1884) 13 Q. B. Div. 784. In such case the Statute of Limitation runs not from the committing of the wrong, but from the commencement of the Act: Lowe *v.* Fox (1885) 15 Q. B. Div. 667.

(*j*) Sect. 12. A trespasser on the wife's separate property cannot justify under the husband's authority. Whether the husband himself could justify entering a house, his wife's separate property, acquired as such before or since the Act, in which she is living apart, *quaere:* Weldon *v.* De Bathe (1884) 14 Q. B. Div. 339.

(*k*) Phillips *v.* Barnet (1876) 1 Q. B. Div. 436.

(*l*) Seroka *v.* Kattenburg (1886) 17 Q. B. Div. 177.

(*m*) Sect. 13, which expressly provides for ante-nuptial liabilities, is rather against the existence of such a right.

(*n*) Johnson *v.* Pie, *supra* (a dictum wider than the decision.)

(*o*) Wright *v.* Leonard (1861) 11 C. B. N. S. 258; 30 L. J. C. P. 365, by Erle C. J. and Byles J., against Willes J. and Williams J. The judgment of Willes J. seems to me conclusive.

the nature of deceit, or, in the old phrase, in actions which "sound in deceit." But this does not seem acceptable on principle.

limited, according to some, to wrongs *contra pacem*.

As to corporations, it is evident that personal injuries cannot be inflicted upon them. It would seem at first sight, and it was long supposed, that a corporation also cannot be liable for personal wrongs (*p*). But this is really part of the larger question of the liability of principals and employers for the conduct of persons employed by them; for a corporation can act and become liable only through its agents or servants. In that connexion we recur to the matter further on.

Corporations.

The greatest difficulty has been (and by some good authorities still is) felt in those kinds of cases where "malice in fact"—actual ill-will or evil motive—has to be proved.

Where bodies of persons, incorporated or not, are intrusted with the management and maintenance of works, or the performance of other duties of a public nature, they are in their corporate or *quasi*-corporate capacity responsible for the proper conduct of their undertakings no less than if they were private owners: and this whether they derive any profit from the undertaking or not (*q*).

Responsibility of public bodies for management of works, &c. under their control.

* The same principle has been applied to [* 52] the management of a public harbour by the executive government of a British colony (*r*). The rule is subject, of course, to the special statutory provisions as to liability and remedies that may exist in any particular case (*s*).

(*p*) The difficulty felt in earlier times was one purely of process; not that a corporation was metaphysically incapable of doing wrong, but that it was not physically amenable to *capias* or *exigent:* 22 Ass. 100, pl. 67, and other authorities collected by Sergeant Manning in the notes to Maund *v.* Monmouthshire Canal Co., 4 M. & G. 452. But it was decided in the case just cited (1842) that trespass, as earlier in Yarborough *v.* Bank of England (1812) 16 East 6, that trover, would lie against a corporation aggregate.

(*q*) Mersey Docks Trustees *v.* Gibbs (1864-6) L. R. 1 H. L. 93: see the very full and careful opinion of the judges delivered by Blackburn J. at pp. 102, *sqq.*, in which the previous authorities are reviewed.

(*r*) Reg. *v.* Williams (appeal from New Zealand) 9 App. Ca. 418.

(*s*) L. R. 1 H. L. 107, 110.

2.—*Effect of a Party's Death.*

Effect of death of either party. *Actio personalis moritur cum persona.*

We have next to consider the effect produced on liability for a wrong by the death of either the person wronged or the wrong-doer. This is one of the least rational parts of our law. The common law maxim is *actio personalis moritur cum persona*, or the right of action for tort is put an end to by the death of either party, even if an action has been commenced in his lifetime. Causes of action on a contract are quite as much "personal" in the technical sense, but with the exception of promises of marriage, and (it seems) injuries to the person by negligent performance of a contract, the maxim does not apply to these. In cases of tort not falling within certain statutory exceptions, to be presently mentioned, the estate of the person wronged has no claim, and that of the wrong-doer is not liable. Where an action on a tort is referred to arbitration, and one of the parties dies after the hearing but before the making of the award, the cause of action is extinguished notwithstanding a clause in the order of reference providing for delivery of the award to the personal representatives of a party dying before the award is made. Such a clause is insensible with regard to a cause of action in tort; the agreement for reference be- [* 53] ing directed merely to the mode of trial, * and not extending to alter the rights of the parties (*t*). A very similar rule existed in Roman law, with the modification that the inheritance of a man who had increased his estate by *dolus* was bound to restore the profit so gained, and that in some cases heirs might sue but could not be sued (*u*). Whether derived from a hasty following of the Roman rule or otherwise, the common law knew no such variations; the maxim was absolute. At one time it may have been justified by the vindictive and *quasi*-criminal character of suits for civil injuries. A process which is still felt to be a substitute for private war may seem incapable of being continued on behalf of or against a dead man's estate, an impersonal abstraction represented no doubt by one or more living persons, but by persons who need not be of kin to the deceased. Some such feeling seems to be implied in

(*t*) Bowker *v.* Evans (1885) 15 Q. B. Div. 565.

(*u*) I. iv. 12, de perpetuis et temporalibus actionibus, 1. Another difference in favour of the Roman law is that death of a party after *litis contestatio* did not abate the action in any case. It has been conjectured that *personalis* in the English maxim is nothing but a misreading of *poenalis*.

the dictum, "If one doth a trespass to me, and dieth, the action is dead also, because it should be inconvenient to recover against one who was not a party to the wrong" (*v*).

A barbarous rule.

But when once the notion of vengeance has been put aside, and that of compensation substituted, the rule *actio personalis moritur cum persona* seems to be without plausible ground. First, as to the liability, it is impossible to see why a wrong-doer's estate should ever be exempted from making satisfaction for his wrongs. It is better that the residuary legatee should be to some extent cut short than that the person wronged should be deprived of * redress. The legatee can in [* 54] any case take only what prior claims leave for him, and there would be no hardship in his taking subject to all obligations, *ex delicto* as well as *ex contractu*, to which his testator was liable. Still less could the reversal of the rule be a just cause of complaint in the case of intestate succession. Then as to the right: it is supposed that personal injuries cause no damage to a man's estate, and therefore after his death the wrong-doer has nothing to account for. But this is oftentimes not so in fact. And, in any case, why should the law, contrary to its own principles and maxims in other departments, presume it, in favour of the wrong-doer, so to be? Here one may almost say that *omnia praesumuntur pro spoliatore*. Personal wrongs, it is allowed, may "operate to the temporal injury" of the personal estate, but without express allegation the Court will not intend it (*x*). The burden should rather lie on the wrong-doer to show that the estate has not suffered appreciable damage. But it is needless to pursue the argument of principle against a rule which has been made at all tolerable for a civilized country only by a series of exceptions (*y*); of which presently.

Extension of the rule in Osborn *v.* Gillett.

The rule has even been pushed to this extent, that the death of a human being cannot be a cause of action in a civil Court for a person not claiming through or representing the person killed, who in the case of an injury short of death would have been entitled to sue. A master can sue for injuries done to his servant by a wrongful act or neglect, whereby the service of the ser-

(*v*) Newton C. J. in Year-Book 19 Hen. VI. 66 pl. 10 (A. D. 1440-41).

(*x*) Chamberlain *v.* Williamson, 2 M. & S. at p. 414.

(*y*) Cp. Bentham, Traités de Législation, vol. ii. pt. 2, c. 10.

vant is lost to the master. But if the injury causes the [* 55] servant's death, it is * held that the master's right to compensation is gone (*z*). We must say it is so held, as the decision has not been overruled, or, that I know of, judicially questioned. But the dissent of Lord Bramwell is enough to throw doubt upon it. The previous authorities are inconclusive, and the reasoning of Lord Bramwell's (then Baron Bramwell's) judgment is, we submit, unanswerable on principle. At all events "actio personalis moritur cum persona" will not serve in this case. Here the person who dies is the servant; his own cause of action dies with him, according to the maxim, and his executors cannot sue for the benefit of his estate (*a*). But the master's cause of action is altogether a different one. He does not represent or claim through the servant; he sues in his own right, for another injury, on another estimation of damage; the two actions are independent, and recovery in the one action is no bar to recovery in the other. Nothing but the want of positive authority can be shown against the action being maintainable. And if want of authority were fatal, more than one modern addition to the resources of the Common Law must have been rejected (*b*). It is alleged, indeed, that "the policy of the law refuses to recognize the interest of one person in the death of another" (*c*)—a reason which would make life insurance and leases for lives illegal. Such are the idle after-thoughts invented to support arguments founded in mere prejudice. An- [* 56] other and equally * absurd reason sometimes given for the rule is that the value of human life is too great to be estimated in money: in other words, because the compensation cannot be adequate there shall be no compensation at all (*d*). It is true that the action by a master for loss of service consequential on a

(*z*) Osborn *v.* Gillett (1873) L. R. 8 Ex. 88, diss. Bramwell B.

(*a*) Under Lord Campbell's Act (*infra*) they may have a right of suit for the benefit of certain persons, not the estate as such.

(*b*) *E. g.* Collen *v.* Wright, Ex. Ch. 8 E. & B. 647; 27 L. J. Q. B. 215 (agent's implied warranty of authority—a doctrine introduced, by the way, for the very purpose of escaping the iniquitous effect of the maxim now in question, by getting a cause of action in contract which could be maintained againt executors); Lumley *v.* Gye (1853) 2 E. & B. 216; 22 L. J. Q. B. 463, which we shall have to consider hereafter.

(*c*) L. R. 8 Ex. at p. 90, *arg.*

(*d*) The Roman lawyers, however, seem to have held a like view. "Liberum corpus nullam recipit aestimationem:" D. 9. 3, de his qui effud., 1, § 5; cf. h. t. 7, and D. 9. 1, si quadrupes, 3. See Grueber on the Lex Aquilla, p. 17.

wrong done to his servant belongs to a somewhat archaic head of the law which has now become almost anomalous; perhaps it is not too much to say that in our own time the Courts have discouraged it. This we shall see in its due place. But that is no sufficient reason for discouraging the action in a particular case by straining the application of a rule in itself absurd. Osborn *v.* Gillett stands in the book, and we cannot actually say it is not law; but one would like to see the point reconsidered by the Court of Appeal (*e*).

Exceptions: Statutes of Ed. III. giving executors right of suit for trespasses.

We now proceed to the exceptions. The first amendment was made as long ago as 1330, by the statute 4 Ed. 3, c. 7, of which the English version runs thus :

Item, whereas in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted that the executors in such cases shall have an action against the trespassers to recover damages in like manner as they, whose executors they be, should have had if they were in life.

The right was expressly extended to executors of executors by 25 Ed. 3, st. 5, c. 5, and was construed to extend * to administrators (*f*). It was held [* 57] not to include injuries to the person or to the testator's freehold.

Of Will. IV. as to injuries to property.

Then by 3 & 4 Will. 4, c. 42 (A. D. 1833) actionable injuries to the real estate of any person committed within six calendar months before his death may be sued upon by his personal representatives, for the benefit of his personal estate, within one year after his death : and a man's estate can be made liable, through his personal representatives, for wrongs done by him within six calendar months before his death " to another in respect of his property, real or personal." In this latter case the action must be brought against the wrong-doer's representatives within six months after they have entered on their office. Under this statute the executor of a tenant for life has been held liable to the remainderman for waste committed during the tenancy (*g*).

(*e*) Cp. Mr. Horace Smith's remarks on this case (Smith on Negligence, 2nd ed. 256).

(*f*) See note to Pinchon's case, 9 Co. Rep. 89 a, vol. v. p. 161 in ed. 1826.

(*g*) Woodhouse *v.* Walker (1880) 5 Q. B. Div. 404.

No right of action for damage to personal estate consequential on personal injury.

Nothing in these statutes affects the case of a personal injury causing death, for which according to the maxim there is no remedy at all. It has been attempted to maintain that damage to the personal estate by reason of a personal injury, such as expenses of medical attendance, and loss of income through inability to work or attend to business, will bring the case within the statute of Edward III. But it is held that "where the cause of action is in substance an injury to the person," an action by personal representatives cannot be admitted on this ground: the original wrong itself, not only its consequences, must be an injury to property (*h*).

Lord Campbell's Act: peculiar rights created by it.

[* 58] * Railway accidents, towards the middle of the present century, brought the hardship of the common law rule into prominence. A man who was maimed or reduced to imbecility by the negligence of a railway company's servants might recover heavy damages. If he died of his injuries, or was killed on the spot, his family might be ruined, but there was no remedy. This state of things brought about the passing of Lord Campbell's Act (9 & 10 Vict. c, 93, A.D. 1846), a statute extremely characteristic of English legislation (*i*). Instead of abolishing the barbarous rule which was the root of the mischief complained of, it created a new and anomalous kind of right and remedy by way of exception, It is entitled "An Act for compensating the Families of Persons killed by Accident": it confers a right of action on the personal representatives of a person whose death has been caused by a wrongful act, neglect, or default such that if death had not ensued that person might have maintained an action; but the right conferred is not for the benefit of the personal estate, but "for the benefit of the wife, husband, parent and child (*k*) of the person whose death shall have been so caused."

(*h*) Pulling *v.* G. E. R. Co. (1882) 9 Q. B. D. 110; cp. Leggott *v.* G. N. R. Co., 1 Q. B. D. 599; the earlier case of Bradshaw *v.* Lancashire and Yorkshire R. Co. (1875) L. R. 10 C. P. 189, is doubted, but distinguished as being on an action of contract.

(*i*) It appears to have been suggested by the law of Scotland, which already gave a remedy: see Campbell on Negligence, 20 (2nd edit.); and Blake *v.* Midland R. Co., 18 Q. B. 93; 21 L. J. Q. B. 233 (in argument for plaintiff.)

(*k*) "Parent" includes father and mother, grandfather and grandmother, stepfather and stepmother. "Child" includes son and daughter, grandson and granddaughter, stepson and stepdaughter: sect. 5. It does not include illegitimate children: Dickinson *v.* N. E. R. Co., 2 H. & C. 735; 33 L. J. Ex. 91. There is no reason to doubt that it includes an unborn child. See The George and Richard, L. R. 3 P. & D. 466, which, however, is not of judicial authority on this point, for a few months later (Smith

Damages have to be assessed according to the injury resulting to the * parties for whose benefit the [* 59] action is brought, and apportioned between them by the jury (*l*). The nominal plaintiff must deliver to the defendant particulars of those parties and of the nature of the claim made on their behalf.

By an amending Act of 1864, 27 & 28 Vict. c. 95, if there is no personal representative of the person whose death has been caused, or if no action is brought by personal representatives within six months, all or any of the persons for whose benefit the right of action is given by Lord Campbell's Act may sue in their own names (*m*).

Construction of Lord Campbell's Act.

The principal Act is inaccurately entitled to begin with (for to a lay reader "accidents" might seem to include inevitable accidents, and again, "accident" does not include wilful wrongs, to which the Act does apply); nor is this promise much bettered by the performance of its enacting part. It is certain that the right of action, or at any rate the right to compensation, given by the statute is not the same which the person killed would have had if he had lived to sue for his injuries. It is no answer to a claim under Lord Campbell's Act to show that the deceased would not himself have sustained pecuniary loss. "The statute . . . gives to the personal representative a cause of action beyond that which the deceased would have had if he had survived, and based on a different principle" (*n*). But "the statute does not in terms say on what principle the action it gives is to be maintainable, nor on what principle the damages are to be assessed; and the only way to * ascertain what it does, is to show [* 60]

---

v. Brown, L. R. 6 Q. B. 729) the Court of Queen's Bench held in prohibition that the Court of Admiralty had no jurisdiction to entertain claims under Lord Campbell's Act; and after some doubt this opinion has been confirmed by the House of Lords: Seward *v.* The Vera Cruz, 10 App. Ca. 59, overruling the Franconia, 2 P. D. 163.

See addenda, Page xxxviii.

(*l*) Where a claim of this kind is satisfied by payment to executors without an action being brought, the Court will apportion the fund, in proceedings taken for that purpose in the Chancery Division, in like manner as a jury could have done: Bulmer *v.* Bulmer (1883) 25 Ch. D. 409.

(*m*) Also, by sect. 2, "money paid into Court may be paid in one sum, without regard to its division into shares" (marginal note).

(*n*) Erle C. J., Pym. *v.* G. N. R. Co. (1863) Ex. Ch. 4 B. & S. at p. 406.

what it does not mean" (*o*). It has been decided that some appreciable pecuniary loss to the beneficiaries (so we may conveniently call the parties for whose benefit the right is created) must be shown; they cannot maintain an action for nominal damages (*p*); nor recover what is called *solatium* in respect of the bodily hurt and suffering of the deceased, or their own affliction (*q*); they must show "a reasonable expectation of pecuniary benefit, as of right or otherwise," had the deceased remained alive. But a legal right to receive benefit from him need not be shown (*r*). Thus, the fact that a grown-up son has been in the constant habit of making presents of money and other things to his parents, or even has occasionally helped them in bad times (*s*), is a ground of expectation to be taken into account in assessing the loss sustained. Funeral and mourning expenses, however, not being the loss of any benefit that could have been had by the deceased person's continuing in life, are not admissible (*t*).

Interests of survivors distinct.

The interests conferred by the Act on the several beneficiaries are distinct. It is no answer to a claim on behalf of some of a man's children who are left poorer that all his children, taken as an undivided class, have got the whole of his property (*u*).

The statutory cause of action is in substitution, not cumulative.

[* 61] * It is said that the Act does not transfer to representatives the right of action which the person killed would have had, "but gives to the representative a totally new right of action on different principles" (*x*). Nevertheless the cause of action is so far the same that if a person who ultimately dies of injuries caused by wrongful act or neglect has accepted satisfaction for them in his lifetime, an action under Lord Campbell's Act is not afterwards maintainable (*y*). For

(*o*) Pollock C. B. in Franklin *v.* S. E. R. Co. (1858) 3 H. & N. at p. 213.

(*p*) Duckworth *v.* Johnson (1859) 4 H. & N. 653; 29 L. J. Ex. 25.

(*q*) Blake *v.* Midland R. Co (1852) 18 Q. B. 93. In Scotland it is otherwise : 1 Macq. 752, n.

(*r*) Franklin *v.* S. E. R. Co., 3 H. & N. 211.

(*s*) Hetherington *v.* N. E. R. Co., 9 Q. B. D. 160.

(*t*) Dalton *v.* S. E. R. Co. (1858) 4 C. B. N. S. 296, closely following Franklin *v.* S. E. R. Co.

(*u*) Pym *v.* G. N. R. Co. (1863) 4 B. & S. 396; 32 L. J. Q. B. 377. The deceased had settled real estate on his eldest son, to whom other estates also passed as heir-at-law.

(*x*) 18 Q. B. at p. 110.

(*y*) Read *v.* G. E. R. Co. (1868) L. R. 3 Q. B. 555.

the injury sued on must, in the words of the Act, be "such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof": and this must mean that he might immediately before his death have maintained an action, which, if he had already recovered or accepted compensation, he could not do.

Scottish and American laws.

In Scotland, as we have incidentally seen, the surviving kindred are entitled by the common law to compensation in these cases, not only to the extent of actual damage but by way of *solatium*. In the United States there exist almost everywhere statutes generally similar to Lord Campbell's Act; but they differ considerably in details from the Act and from one another (*z*). The tendency seems to be to confer on the survivors, both in legislation and in judicial construction, larger rights than in England.

Right to follow property wrongfully taken or converted as against wrongdoer's estate.

In one class of cases there is a right to recover against a wrong-doer's estate, notwithstanding the maxim of *actio personalis*, yet not so as to constitute a formal exception. * When it comes to the point of direct [* 62] conflict, the maxim has to prevail.

As Lord Mansfield stated the rule, "where property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor" (*a*). Or, as Bowen L. J. has more fully expressed it, the cases under this head are those "in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys." In such cases, inasmuch as the action brought by the true owner, in whatever form, is in substance to recover property, the action does not die with the person, but "the property or the proceeds or value which, in the lifetime of the wrong-doer, could have been recovered from him, can be traced after his death to his assets" (by suing the personal representatives) "and recaptured by the rightful owner there." But this rule is limited to the recovery of specific acquisitions or their value. It does not include the recovery of damages, as such,

---

(*z*) Cooley on Torts (Chicago, 1880) 262 *sqq.*; Shearman & Redfield on Neglience, ss. 293 *sqq.* In Arkansas the doctrine of *actio personalis*, &c. appears to have been wholly abrogated by statute: *ib.* s. 295.

(*a*) Hambly *v.* Trott, 1 Cowp. 375.

for a wrong, though the wrong may have increased the wrong-doer's estate in the sense of being useful to him or saving him expense (*b*).

The rule limited to recovery of specific property or its value: Phillips *v.* Homfray.

If A. wrongfully gets and carries away coal from a mine under B.'s land, and B. sues for the value of the coal and damages, and inquiries are directed, pending which A. dies, B. is entitled as against A.'s estate to the value of the coal wrongfully taken, but not to damages for the use of the passages through which the coal was [* 63] carried out, nor for * the injury to the mines or the surface of the ground consequent on A.'s workings (*c*).

Again, A., a manufacturer, fouls a stream with refuse to the damage of B., a lower riparian owner; B. sues A., and pending the action, and more than six months after its commencement (*d*), A. dies. B. has no cause of action against A.'s representatives, for there has been no specific benefit to A.'s estate, only a wrong for which B. might in A.'s lifetime have recovered unliquidated damages (*e*).

The like law holds of a director of a company who has committed himself to false representations in the prospectus, whereby persons have been induced to take shares, and have acquired a right of suit against the issuers. If he dies before or pending such a suit, his estate is not liable (*f*). In short, this right against the executors or administrators of a wrong-doer can be maintained only if there is "some beneficial property or value capable of being measured, followed, and recovered" (*g*). For the rest, the dicta of the late Sir George Jessel and of the Lords Justices are such as to make it evident that the maxim which they felt bound to enforce was far from commanding their approval.

3.—*Liability for the Torts of Agents and Servants.*

Command of principal does not excuse agent's wrong.

Whoever commits a wrong is liable for it himself. It is no excuse that he was acting, as an agent or ser-

(*b*) The technical rule was that executors could not be sued in respect of an act of their testator in his lifetime in any form of action in which the plea was not guilty: Hambly *v.* Trott. 1 Cowp. 375.

(*c*) Phillips *v.* Homfray (1883) 24 Ch. Div. 439, 454. The authorities are fully examined in the judgment of Bowen and Cotton L.JJ.

(*d*) 3 & 4 Will. 4, c. 42, p. 57, above.

(*e*) Kirk *v.* Todd (1882) 21 Ch. Div. 484.

(*f*) Peek *v.* Gurney (1873) L. R. 6 H. L. at p. 392.

(*g*) 24 Ch. D. at p. 463.

vant, on behalf and for the benefit of another (*h*). But that other * may well be also liable: and in [* 64] many cases a man is held answerable for wrongs not committed by himself. The rules of general application in this kind are those concerning the liability of a principal for his agent, and of a master for his servant. Under certain conditions responsibility goes farther, and a man may have to answer for wrongs which, as regards the immediate cause of the damage, are not those of either his agents or his servants. Thus we have cases where a man is subject to a positive duty, and is held liable for failure to perform it. Here, the absolute character of the duty being once established, the question is not by whose hand an unsuccessful attempt was made, whether that of the party himself, of his servant, or of an "independent contractor" (*i*), but whether the duty has been adequately performed or not. If it has, there is nothing more to be considered, and liability, if any, must be sought in some other quarter (*k*). If not, the non-performance in itself, not the causes or conditions of non-performance, is the ground of liability. Special duties created by statute, as conditions attached to the grant of exceptional rights or otherwise, afford the chief examples of this kind. Here the liability attaches, irrespective of any question of agency or personal negligence, if and when the conditions imposed by the legislature are not satisfied (*l*).

Cases of absolute positive duty distinguished:

There occur likewise, though as an exception, duties of this kind imposed by the common law. Such are the duties of common carriers, of owners of dangerous animals or other things involving, by their nature or position, special risk of * harm to their neigh- [* 65] bours; and such, to a limited extent, is the duty of occupiers of fixed property to have it in reasonably safe condition and repair, so far as that end can be assured by the due care on the part not only of themselves and their servants, but of all concerned.

also duties in nature of warranty.

The degrees of responsibility may be thus arranged, beginning with the mildest:

(*h*) Cullen *v.* Thomson's Trustees and Kerr, 4 Macq. 424. 432. "For the contract of agency or service cannot impose any obligation on the agent or servant to commit or assist in the committing of fraud," or any other wrong.

(*i*) The distinction will be explained below.

(*k*) See Hyams *v.* Webster (1868) Ex. Ch. L. R. 4 Q. B. 138.

(*l*) See Gray *v.* Pullen (1864) Ex. Ch. 5 B. & S. 970; 34 L. J. Q. B. 265.

(i) For oneself and specifically authorized agents (this holds always).
(ii) For servants or agents generally (limited to course of employment).
(iii) For both servants and independent contractors (duties as to safe repair, &c.).
(iv) For everything but *vis major* (exceptional: some cases of special risk, and, anomalously, certain public occupations).

Modes of liability for wrongful acts, &c. of others.

Apart from the cases of exceptional duty where the responsibility is in the nature of insurance or warranty, a man may be liable for another's wrong—

(1) As having authorized or ratified that particular wrong:

(2) As standing to the other person in a relation making him answerable for wrongs committed by that person in virtue of their relation, though not specifically authorized.

The former head presents little or no difficulty. The latter includes considerable difficulties of principle, and is often complicated with troublesome questions of fact.

Command and ratification.

It scarce needs authority to show that a man is liable for wrongful acts which have been done according to his express command or request, or which, having been done on his account and for his benefit, he has adopted as his own. "A trespasser may be not only he who does the act, but who commands or procures it to be [* 66] done . . . who aids or * assists in it . . . or who assents afterwards" (*m*). This is not the less so because the person employed to do an unlawful act may be employed as an "independent contractor," so that, supposing it lawful, the employer would not be liable for his negligence about doing it. A gas company employed a firm of contractors to break open a public street, having therefor no lawful authority or excuse; the thing contracted to be done being in itself a public nuisance, the gas company was held liable for injury caused to a foot-passenger by falling over some of the earth and stones excavated and heaped up by the contractors (*n*). A point of importance to be noted in this connexion is that only such acts bind a principal by subsequent ratification as were done at the time on the principal's behalf. What is done by the immediate

(*m*) De Grey C. J. in Barker *v.* Braham (1773) 2 W. Bl. 866 · Bigelow, L. C. 235.
(*n*) Ellis *v.* Sheffield Gas Consumers Co. (1853) 2 E. & B. 767; 23 L. J. Q. B. 42.

actor on his own account cannot be effectually adopted by another; neither can an act done in the name and on behalf of Peter be ratified either for gain or for loss by John. "Ratum quis habere non potest, quod ipsius nomine non est gestum" (*o*).

Master and servant.

The more general rule governing the other and more difficult branch of the subject was expressed by Willes J. in a judgment which may now be regarded as a classical authority. "The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved" (*p*).

Reason of the master's liability.

* No reason for the rule, at any rate no satisfying one, is commonly given in our books. Its importance belongs altogether to the modern law, and it does not seem to be illustrated by any early authority (*q*). Blackstone (i. 417) is short in his statement, and has no other reason to give than the fiction of an "implied command." It is currently said, *Respondeat superior;* which is a dogmatic statement, not an explanation. It is also said, *Qui facit per alium facit per se;* but this is in terms applicable only to authorized acts, not to acts that, although done by the agent or servant "in the course of the service," are specifically unauthorized or even forbidden. Again, it is said that a master ought to be careful in choosing fit servants; but if this were the reason, a master could discharge himself by showing that the servant for whose wrong he is sued was chosen by him with due care, and was in fact generally well conducted and competent: which is certainly not the law. [* 67]

A better account was given by Chief Justice Shaw of Massachusetts. "This rule," he said, "is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for

(*o*) Wilson *v.* Tumman (1843) 6 M. & G. 236; and Serjeant Manning's note, *ib.* 239.

(*p*) Barwick *v.* English Joint Stock Bank (1867), Ex. Ch. L. R. 2 Ex. 259, 265. The point of the decision is that fraud is herein on the same footing as other wrongs: of which in due course.

(*q*) Joseph Brown Q. C. in evidence before Select Committee on Employers' Liability, 1876, p. 38; Brett L. J., 1877, p. 114.

it" (*r*). This is, indeed, somewhat too widely expressed, for it does not in terms limit the responsibility to cases [* 68] * where at least negligence is proved. But no reader is likely to suppose that, as a general rule, either the servant or the master can be liable where there is no default at all. And the true principle is otherwise clearly enounced. I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.

Some time later the rule was put by Lord Cranworth in a not dissimilar form: the master "is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business" (*s*).

The statement of Willes J. that the master "has put the agent in his place to do that class of acts" is also to be noted and remembered as a guide in many of the questions that arise. A just view seems to be taken, though artificially and obscurely expressed, in one of the earliest reported cases on this branch of the law: "It shall be intended that the servant had authority from his master, it being for his master's benefit" (*t*).

Questions to be considered herein.

The rule, then (on whatever reason founded), being that a master is liable for the acts, neglects, and defaults of his servants in the course of the service, we have to define further—

1. Who is a servant.
2. What acts are deemed to be in the course of servants.
3. How the rule is affected when the person injured is himself a servant of the same master.

Who is a servant: responsi-

[* 69] * 1. As to the first point, it is quite possible to do work for a man, in the popular sense, and even to be his agent for some purposes, without being his ser-

(*r*) Farwell *v.* Boston and Worcester Railroad Corporation (1842) 4 Met. 49; and Bigelow L. C. 688. The judgment is also re-printed in 3 Macq. 316. So, too, M. Sainctelette, the latest Continental writer on the subject, well says: "La responsabilité du fait d'autrui n'est pas une fiction inventée par la loi positive. C'est une exigence de l'ordre social:" De la Responsabilité et de la Garantie, p. 124.

(*s*) Bartonshill Coal Co. *v.* Reid (1858) 3 Macq. 266, 283.

(*t*) Turberville *v.* Stampe (end of 17th century) 1 Ld. Raym. 264.

vant. The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct the means also, or, as it has been put, "retains the power of controlling the work" (*u*); and he who does work on those terms is in law a servant for whose acts, neglects, and defaults, to the extent to be specified, the master is liable. An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand. For the acts or omissions of such a one about the performance of his undertaking his employer is not liable to strangers, no more than the buyer of goods is liable to a person who may be injured by the careless handling of them by the seller or his men in the course of delivery. If the contract, for example, is to build a wall, and the builder "has a right to say to the employer, 'I will agree to do it, but I shall do it after my own fashion; I shall begin the wall at this end and not at the other;' there the relation of master and servant does not exist, and the employer is not liable" (*x*). "In ascertaining who is liable for the act of a wrong-doer, you must look to the wrong-doer himself or to the first person in the ascending line who is the employer and has control * over the work. [* 70] You cannot go further back and make the employer of that person liable" (*y*). He who controls the work is answerable for the workman; the remoter employer who does not control it is not answerable. This distinction is thoroughly settled in our law; the difficulties that may arise in applying it are difficulties of ascertaining the facts (*z*). It may be a nice question whether a man

bility goes with order and control.

(*u*) Crompton J., Sadler *v.* Henlock (1855) 4 E. & B. 570, 578; 24 L. J. Q. B. 138, 141.

(*x*) Bramwell L. J., Emp. L. 77, p. 58. An extra-judicial statement, but made on an occasion of importance by a great master of the common law.

(*y*) Willis J., Murray *v.* Currie (1870) L. R. 6 C. P. 24, 27.

(*z*) One comparatively early case, Bush *v.* Steinman, 1 B. & P. 404, disregards the rule; but that case has been repeatedly commented on with disapproval, and is not now law. See the modern authorities well reviewed in Hillard *v.* Richardson (Sup. Court, Mass. 1855) 3 Gray 349; and in Bigelow L. C. Exactly the same distinction appears to be taken under the Code Napoléon in fixing the limits within which the very wide language of Art. 1384 is to be applied: Sainctelette, *op. cit.* 127.

has let out the whole of a given work to an "independent contractor," or reserved so much power of control as to leave him answerable for what is done (*a*).

Specific assumption of control.

It must be remembered that the remoter employer, if at any point he does interfere and assume specific control, renders himself answerable, not as a master, but as principal. He makes himself "dominus pro tempore." Thus the hirer of a carriage driven by a coachman who is not the hirer's servant but the letter's, is not, generally speaking, liable for harm done by the driver's negligence (*b*). But if he orders, or by words or conduct at the time sanctions, a specific act of rash [* 71] or careless driving, he may well be * liable (*c*). Rather slight evidence of personal interference has been allowed as sufficient in this class of cases (*d*).

Temporary transfer of service.

One material result of this principle is that a person who is habitually the servant of A. may become, for a certain time and for the purpose of certain work, the servant of B.; and this although the hand to pay him is still A.'s. The owner of a vessel employs a stevedore to unload the cargo. The stevedore employs his own labourers; among other men, some of the ship's crew work for him by arrangement with the master, being like the others paid by the stevedore and under his orders. In the work of unloading these men are the servants of the stevedore, not of the owner (*e*).

Owners of a colliery, after partly sinking a shaft, agree with a contractor to finish the work for them, on the terms, among others, that engine power and engineers to work the engine are to be provided by the owners. The engine that has been used in excavating the shaft is handed over accordingly to the contractor:

(*a*) Pendlebury *v.* Greenhalgh, 1 Q. B. Div. 36, differing from the view of the same facts taken by the Court of Queen's Bench in Taylor *v.* Greenhalgh, L. R. 9 Q. B. 487.

(*b*) Even if the driver was selected by himself: Quarman *v.* Burnett, 6 M. &. W. 499. So where a vessel is hired with its crew: Dallyell *v.* Tyrer (1858) 8 E. B. & E. 899; 28 L. J. Q. B. 52. So where a contractor finds horses and drivers to draw watering-carts for a municipal corporation, the driver of such a cart is not the servant of the corporation: Jones *v.* Corporation of Liverpool (1885) 14 Q. B. D. 890; cp. Little *v.* Hackett, Sup. Ct. U. S. (1886) 14 Am. Law Rec. at p. 581

(*c*) McLaughlin *v.* Pryor (1842) 4 M. & G. 48.

(*d*) Ib.; Burgess *v.* Gray, 1 C. B. 578. It is difficult in either case to see proof of more than adoption or acquiesence. Cp. Jones *v.* Corporation of Liverpool, 14 Q. B. D. at pp. 893-4.

(*e*) Murray *v.* Currie (1870) L. R. 6 C. P. 24.

the same engineer remains in charge of it, and is still paid by the owners, but is under the orders of the contractor. During the continuance of the work on these terms the engineer is the servant not of the colliery owners but of the contractor (*f*).

"Power of controlling the work" explained.

It is proper to add that the "power of controlling the work" which is the legal criterion of the relation of a master to a servant does not necessarily mean a present and physical ability. Shipowners are answerable for the acts of the master, though done under circumstances in * which it is impossible to com- [* 72] municate with the owners (*g*). It is enough that the servant is bound to obey the master's directions if and when communicated to him. The legal power of control is to actual supervision what in the doctrine of possession *animus domini* is to physical detention. But this much is needful: therefore a compulsory pilot, who is in charge of the vessel independently of the owner's will, and, so far from being bound to obey the owner's or master's orders, supersedes the master for the time being, is not the owner's servant, and the statutory exemption of the owner from liability for such a pilot's acts is but in affirmance of the common law (*h*).

What is in course of employment.

2. Next we have to see what is meant by the course of service or employment. The injury in respect of which a master becomes subject to this kind of vicarious liability may be caused in the following ways;—

(a) It may be the natural consequence of something being done by a servant with ordinary care in execution of the master's specific orders.

(b) It may be due to the servant's want of care in carrying on the work or business in which he is employed. This is the commonest case.

(c) The servant's wrong may consist in excess or mistaken execution of a lawful authority.

(d) Or it may even be a wilful wrong, such as assault, provided the act is done on the master's behalf and with the intention of serving his purposes.

Let us take these heads in order.

Execution of specific orders.

(a) Here the servant is the master's agent in a pro-

(*f*) Rourke *v.* White Moss Colliery Co. (1877), 2 C. P. Div. 205.
(*g*) See Maude and Pollock, Merchant Shipping, i. 158, 4th ed.
(*h*) Merchant Shipping Act, 1854, s. 388; The Halley, L. R. 2 P. C. at p. 201. And see Marsden on Collisions at Sea, ch. 5.

per sense, and the master is liable for that which he has [* 73] truly, * not by the fiction of a legal maxim, commanded to be done. He is also liable for the natural consequences of his orders, even though he wished to avoid them, and desired his servant to avoid them. Thus in Gregory *v.* Piper (*i*), a right of way was disputed between adjacent occupiers, and the one who resisted the claim ordered a labourer to lay down rubbish to obstruct the way, but so as not to touch the other's wall. The labourer executed the orders as nearly as he could, and laid the rubbish some distance from the wall, but it soon "shingled down" and ran against the wall, and in fact could not by any ordinary care have been prevented from doing so. For this the employer was held to answer as for a trespass which he had authorized. This is a matter of general principle, not of any special kind of liability. No man can authorize a thing and at the same time affect to disavow its natural consequences; no more than he can disclaim responsibility for the natural consequences of what he does himself.

Negligence in conduct of master's business.

(b) Then comes the case of the servant's negligence in the performance of his duty, or rather while he is about his master's business. What constitutes negligence does not just now concern us; but it must be established that the servant is a wrong-doer, and liable to the plaintiff, before any question of the master's liability can be entertained. Assuming this to be made out, the question may occur whether the servant was in truth on his master's business at the time, or engaged on some pursuit of his own. In the latter case the master is not liable. "If the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of his servant in doing [* 74] * it" (*k*). For example: "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, . . . the master will not be liable. But if, in order to perform his master's orders, he strikes but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the

(*i*) 9 B. & C. 591 (1829).
(*k*) Maule J., Mitchell *v.* Crassweller (1853) 13 C. B. 237; 23 L. J. C. P. 100.

master will be liable, being an act done in pursuance of the servant's employment" (*l*).

Whether the servant is really bent on his master's affairs or not is a question of fact, but a question which may be troublesome. Distinctions are suggested by some of the reported cases which are almost too fine to be acceptable. The principle, however, is intelligible and rational. Not every deviation of the servant from the strict execution of duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibilty. But where there is not merely deviation, but a total departure from the course of the master's business, so that the servant may be said to be "on a frolic of his own" (*m*), the master is no longer answerable for the servant's conduct. Two modern cases of the same class and period, one on either side of the line, will illustrate this distinction. Departure or deviation from master's business.

In Whatman *v.* Pearson (*n*), a carter who was employed by a contractor, having the allowance of an hour's time for dinner in his day's work, but also having orders not to * leave his horse and cart, or [* 75] the place where he was employed, happened to live hard by. Contrary to his instructions, he went home to dinner, and left the horse and cart unattended at his door; the horse ran away and did damage to the plaintiff's railings. A jury was held warranted in finding that the carman was throughout in the course of his employment as the contractor's servant "acting within the general scope of his authority to conduct the horse and cart during the day" (*o*). Whatman *v.* Pearson.

In Storey *v.* Ashton (*p*), a carman was returning to his employer's office with returned empties. A clerk of the same employer's who was with him induced him, when he was near home, to turn off in another direction to call at a house and pick up something for the clerk. While the carman was driving in this direction he ran over the plaintiff. The Court held that if the Storey *v.* Ashton.

(*l*) Croft *v.* Alison (1821) 4 B. & A. 590.

(*m*) Parke B., Joel *v.* Morison (1834) 6 C. & P. 503: a nisi prius case, but often cited with approval; see Burns *v.* Poulson, L. R. 8 C. P. at p. 567.

(*n*) L. R. 3 C. P. 422 (1868).

(*o*) Byles J. at p. 425.

(*p*) L. R. 4 Q. B. 470 (1869); Mitchell *v.* Crassweller, cited above, was a very similar case.

carman "had been merely going a roundabout way home, the master would have been liable; but he had started on an entirely new journey on his own or his fellow-servant's account, and could not in any way be said to be carrying out his master's employment" (*q*). More lately it has been held that if the servant begins using his master's property for purposes of his own, the fact that by way of afterthought he does something for his master's purposes also is not necessarily such a "re-entering upon his ordinary duties" as to make the master answerable for him. A journey undertaken on the ser-[* 76] vant's own account "cannot by the * mere fact of the man making a pretence of duty by stopping on his way be converted into a journey made in the course of his employment" (*r*).

Williams *v.* Jones.

The following is a curious example. A carpenter was employed by A. with B.'s permission to work for him in a shed belonging to B. This carpenter set fire to the shed in lighting his pipe with a shaving. His act, though negligent, having nothing to do with the purpose of his employment, A. was not liable to B. (*s*). It does not seem difficult to pronounce that lighting a pipe is not in the course of a carpenter's employment; but the case was one of difficulty as being complicated by the argument that A., having obtained a gratuitous loan of the shed for his own purposes, was answerable, without regard to the relation of master and servant, for the conduct of persons using it. This failed for want of anything to show that A. had acquired the exclusive use and control of the shed. Apart from this, the facts come very near to the case which has been suggested, but not dealt with by the Courts in any reported decision, of a miner opening his safety-lamp to get a light for his pipe, and thereby causing an explosion: where "it seems clear that the employer would not be held liable" (*t*).

Excess or mistake in

(c) Another kind of wrong which may be done by a

(*q*) Lush J. at p. 480. It was "an entirely new and independent journey, which had nothing at all to do with his employment:" Cockburn C. J. "Every step he drove was away from his duty:" Mellor J., ibid. But it could have made no difference if the accident had happened as he was coming back. See the next case.

(*r*) Rayner *v.* Mitchell, 2 C. P. D. 357.

(*s*) Williams *v.* Jones (1865) Ex. Ch. 3 H. & C. 256, 602; 33 L. J. Ex. 297; diss. Mellor and Blackburn JJ.

(*t*) R. S. Wright, Emp. L. 76, p. 47.

servant in his master's business, and so as to make the master liable, is the excessive or erroneous execution of a lawful authority. To establish a right of action against the master in such a case it must be shown that (*α*) the * servant intended to do on behalf of his mas- [* 77] ter something of a kind which he was in fact authorized to do; (*β*) the act, if done in a proper manner, or under the circumstances erroneously supposed by the servant to exist, would have been lawful. execution of authority.

The master is chargeable only for acts of an authorized class which in the particular instance are wrongful by reason of excess or mistake on the servant's part. For acts which he has neither authorized in kind nor sanctioned in particular he is not chargeable.

Most of the cases on this head have arisen out of acts of railway servants on behalf of the companies. A porter whose duty is, among other things, to see that passengers do not get into wrong trains or carriages (but not to remove them from a wrong carriage), asks a passengerwho has just taken his seat where he is going. The passenger answers, "To Macclesfield." The porter, thinking the passenger is in the wrong train, pulls him out; but the train was in fact going to Macclesfield, and the passenger was right. On those facts a jury may well find that the porter was acting within his general authority so as to make the company liable (*u*). Here are both error and excess in the servant's action: error in supposing facts to exist which make it proper to use his authority (namely, that the passenger has got into the wrong train); excess in the manner of executing his authority, even had the facts been as he supposed. But they do not exclude the master's liability. Interference with passengers by guards, &c.

"A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, * according to the circumstances that [* 78] arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held responsible for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment" (*x*).

(*u*) Bayley *v.* Manchester, Sheffield, and Lincolnshire R. Co. (1872–3) L. R. 7 C. P. 415, in Ex. Ch. 8 C. P. 148.

(*x*) Per Willes J., Bayley *v.* Manchester, Sheffield, and Lincolnshire R. Co., L. R. 7 C. P. 415.

Seymour *v.* Greenwood (*y*) is another illustrative case of this class. The guard of an omnibus removed a passenger whom he thought it proper to remove as being drunken and offensive to the other passengers, and in so doing used excessive violence. Even if he were altogether mistaken as to the conduct and condition of the passenger thus removed, the owner of the omnibus was answerable. "The master, by giving the guard authority to remove offensive passengers, necessarily gave him authority to determine whether any passenger had misconducted himself."

Arrest of supposed offenders.

Another kind of case under this head is where a servant takes on himself to arrest a supposed offender on his employer's behalf. Here it must be shown, both that the arrest would have been justified if the offence had really been committed by the party arrested, and that to make such an arrest was within the employment of the servant who made it. As to the latter point, however, "where there is a necessity to have a person on the spot to act on an emergency, and to determine whether certain things shall or shall not be done, the fact that there is a person on the spot who is [* 79] acting as if he had express authority is * *primâ facie* evidence that he had authority" (*z*). Railway companies have accordingly been held liable for wrongful arrests made by their inspectors or other officers as for attempted frauds on the company punishable under statutes or authorized by-laws, and the like (*a*).

Act wholly outside authority, master not liable.

But the master is not answerable if the servant takes on himself, though in good faith and meaning to further the master's interest, that which the master has no right to do even if the facts were as the servant thinks them to be: as where a station-master arrested a passenger for refusing to pay for the carriage of a horse, a thing outside the company's powers (*b*). The same rule holds if the particular servant's act is plainly beyond his authority, as where the officer in charge of a railway station arrests a man on suspicion of stealing the company's goods, an act which is not part of the company's general business nor for their apparent benefit (*c*). In

(*y*) 7 H. & N. 355; 30 L. J. Ex. 189, 327, Ex. Ch. (1861).

(*z*) Blackburn J., Moore *v.* Metrop. R. Co., L. R. 8 Q. B. 36, 39.

(*a*) Ib., following Goff *v.* Gt. N. R. Co. (1861) 3 E. & E. 672; 30 L. J. Q. B. 148.

(*b*) Poulton *v.* L. & S. W. R. Co., L. R. 2 Q. B. 534.

(*c*) Edwards *v.* L. & N. W. R. Co., L. R. 5 C. P. 445; cp. Allen *v.* L. & S. W. R. Co., L. R. 6 Q. B. 65.

a case not clear on the face of it, as where a bank manager commences a prosecution, which turns out to be groundless, for a supposed theft of the bank's property —a matter not within the ordinary routine of banking business, but which might in the particular case be within the manager's authority—the extent of the servant's authority is a question of fact (*d*). Much must depend on the nature of the matter in which the authority is given. Thus an agent intrusted with general and ample powers for the management of a farm has been held to be clearly outside the scope of his authority in entering on * the adjacent owner's land on [* 80] the other side of a boundary ditch in order to cut underwood which was choking the ditch and hindering the drainage from the farm. If he had done something on his employer's own land which was an actionable injury to adjacent land, the employer might have been liable. But it was thought unwarrantable to say "that an agent intrusted with authority to be exercised over a particular piece of land has authority to commit a trespass on other land" (*e*).

Wilful trespasses, &c. for master's purposes.

(d) Lastly, a master may be liable even for wilful and deliberate wrongs committed by the servant, provided they be done on the master's account and for his purposes: and this, no less than in other cases, although the servant's conduct is of a kind actually forbidden by the master. Sometimes it has been said that a master is not liable for the "wilful and malicious" wrong of his servant. If "malicious" means "committed exclusively for the servant's private ends," or "malice" means "private spite" (*f*), this is a correct statement; otherwise it is contrary to modern authority. The question is not what was the nature of the act in itself, but whether the servant intended to act in the master's interest.

This was decided by the Exchequer Chamber in Limpus *v.* London General Omnibus Company (*g*), where the defendant company's driver had obstructed the plaintiff's omnibus by pulling across the road in front of it, and caused it to upset. He had printed instruc-

(*d*) Bank of New South Wales *v.* Owston (J. C.) 4 App. Ca. 270.

(*e*) Bolingbroke *v.* Swindon Local Board (1874) L. R. 9 C. P. 575.

(*f*) See per Blackburn J. 1 H. & C. 543.

(*g*) 1 H. & C. 526; 32 L. J. Ex. 34 (1862). This and Seymour *v.* Greenwood (above) overrule M'Manus *v.* Crickett, 1 East 106.

tions not to race with or obstruct other omnibuses. Martin B. directed the jury, in effect, that if the driver [* 81] acted in the way of * his employment and in the supposed interest of his employers as against a rival in their business, the employers were answerable for his conduct, but they were not answerable if he acted only for some purpose of his own: and this was approved by the Court (*h*) above. The driver "was employed not only to drive the omnibus, but also to get as much money as he could for his master, and to do it in rivalry with other omnibuses on the road. The act of driving as he did is not inconsistent with his employment, when explained by his desire to get before the other omnibus." As to the company's instructions, "the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability"(*i*).

Fraud of agent or servant.

That an employer is liable for frauds of his servant committed without authority, but in the course of the service and for the employer's purposes, was established with more difficulty; for it seemed harsh to impute deceit to a man personally innocent of it, or (as in the decisive cases) to a corporation, which, not being a natural person, is incapable of personal wrong-doing. (*k*). But when it was fully realized that in all these cases the master's liability is imposed by the policy of the law without regard to personal default on his part, so that his express command or privity need not be shown it was a necessary consequence that fraud should [* 82] be on the same footing as any other * wrong (*l*). So the matter is handled in our leading authority, the judgment of the Exchequer Chamber delivered by Willes J. in Barwick *v.* English Joint Stock Bank.

"With respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong" (*m*).

(*h*) Williams, Crompton, Willes, Byles Blackburn JJ., diss. Wrightman J.

(*i*) Willes J. 1 H. & C. at p. 539.

(*k*) This particular difficulty is fallacious. It is in truth neither more nor less easy to think of a corporation as deceiving (or being deceived) than as having a consenting mind. In no case can a corporation be invested with either rights or duties except through natural persons who are its agents.

(*l*) It makes no difference if the fraud includes a forgery: Shaw *v.* Port Philip Gold Mining Co., 13 Q. B. D. 103.

(*m*) L. R. 2 Ex. at p. 265.

This has been more than once fully approved in the Privy Council (*n*), and may now be taken, notwithstanding certain appearances of conflict (*o*), to have the approval of the House of Lords also (*p*). What has been said to the contrary was either extra-judicial, as going beyond the *ratio decidendi* of the House, or is to be accepted as limited to the particular case where a member of an incorporated company, not having ceased to be a member, seeks to charge the company with the fraud of its directors or other agents in inducing him to join it (*q*).

* The leading case of Mersey Dock Trustees *v.* [*83] Gibb (*r*) may also be referred to in this connexion, as illustrating the general principles according to which liabilities are imposed on corporations and public bodies.

Liability of firm for fraud of a partner.

There is abundant authority in partnership law to show that a firm is answerable for fraudulent misappropriation of funds, and the like, committed by one of the partners in the course of the firm's business and within the scope of his usual authority, though no benefit be derived therefrom by the other partners. But, agreeably to the principles above stated, the firm is not liable if the transaction undertaken by the defaulting partner is outside the course of partnership business. Where, for example, one of a firm of solicitors receives money to be placed in a specified investment, the firm must answer for his application of it, but not, as a rule, if he

(*n*) Mackey *v.* Commercial Bank of New Brunswick (1874) L. R. 5 P. C. 412; Swire *v.* Francis (1877) 3 App. Ca. 106.

(*o*) Addie *v.* Western Bank of Scotland (1867) L. R. 1 Sc. & D. 145, dicta at pp. 158, 166, 167.

(*p*) Houldsworth *v.* City of Glasgow Bank (1880) 5 App. Ca. 317.

(*q*) Ib., Lord Selborne at p. 326, Lord Hatherley at p. 331; Lord Blackburn's language at p. 339 is more cautious, perhaps for the very reason that he was a party to the decision of Barwick *v.* English Joint Stock Bank. Shortly, the shareholder is in this dilemma: while he is a member of the company, he is damnified by the alleged deceit, if at all, solely in that he is liable as a shareholder to contribute to the company's debts: this liability being of the essence of a shareholder's position, claiming compensation from the company for it involves him in a new liability to contribute to that compensation itself, which is an absurd circuity. But if his liability as a shareholder has ceased, he is no longer damnified. Therefore restitution only (by rescission of his contract), not compensation, is the shareholder's remedy as against the company: though the fraudulent agent remains personally liable.

(*r*) L. R. 1 H. L. 93 (1864–6).

receives it with general instructions to invest it for the client at his own discretion (*s*). Again, the firm is not liable if the facts show that exclusive credit was given to the actual wrong-doer (*t*). In all these cases the wrong is evidently wilful. In all or most of them, however, it is at the same time a breach of contract or trust. And it seems to be on this ground that the firm is held liable even when the defaulting partner, though professing to act on behalf of the firm, misapplies funds or securities merely for his own separate gain. The reasons given are not always free from admixture of the [* 84] Protean * doctrine of "making representations good," which is now, I venture to think, exploded (*u*).

Injuries to servants by fault of fellow-servants.

3. There remains to be considered the modification of a master's liability for the wrongful act, neglect, or default of his servant when the person injured is himself in and about the master's service. It is a topic far from clear in principle: the Employers' Liability Act, 1880, has obscurely indicated a sort of a counter principle, and introduced a number of minute and empirical exceptions, or rather limitations of the exceptional rule in question. That rule, as it stood before the Act of 1880, is that a master is not liable to his servant for injury received from any ordinary risk of or incident to the service, including acts or defaults of any other person employed in the same service. Our law can show no more curious instance of a rapid modern development. The first evidence of any such rule is in Priestley *v.* Fowler (*x*), decided in 1837, which proceeds on the theory (if on any definite theory) that the mastery "cannot be bound to take more care of the servant than he may reasonably be expected to do of himself;" that a servant has better opportunities than his master of watching and controlling the conduct of his fellow-servants; and that a contrary doctrine would lead to intolerable inconvenience, and encourage servants to be negligent. According to this there would be a sort of presumption that the servant suffered to some extent by

Common law rule of master's immunity.

(*s*) Cp. Blair *v.* Bromley, 2 Ph. 354, and Cleather *v.* Twisden, 24 Ch. D. 731, with Harman *v.* Johnson, 2 E. & B. 61.

(*t*) Ex parte Eyre, 1 Ph. 227. See more illustrations in my "Digest of the Law of Partnership," art 24.

(*u*) I have discussed it in Appendix L. to "Principles of Contract," 3rd ed. (N. in 4th ed.) See now Maddison *v.* Alderson, 8 App. Ca. at p. 473.

(*x*) 3 M. & W. 1. All the case actually decided was that a master does not warrant to his servant the sufficiency and safety of a carriage in which he sends him out.

want of diligence on his own part. But it is needless to pursue this reasoning; for the like result was a few years * afterwards arrived at by Chief Justice Shaw [* 85] of Massachusetts by another way, and in a judgment which is the fountain-head of all the later decisions (*y*). The accepted doctrine is to this effect. Strangers can hold the master liable for the negligence of a servant about his business. But in the case where the person injured is himself a servant in the same business he is not in the same position as a stranger. He has of his free will entered into the business and made it his own. He cannot say to the master, You shall so conduct your business as not to injure me by want of due care and caution therein. For he has agreed with the master to serve in that business, and his claims on the master depend on the contract of service. Why should it be an implied term of that contract, not being an express one, that the master shall indemnify him against the negligence of a fellow-servant, or any other current risk? It is rather to be implied that he contracted with the risk before his eyes, and that the dangers of the service, taken all round, were considered in fixing the rate of payment. This is, I believe, a fair summary of the reasoning which has prevailed in the authorities. With its soundness we are not here concerned. It was not only adopted by the House of Lords for England, but forced by them upon the reluctant Courts of Scotland to make the jurisprudence of the two countries uniform (*z*). No such doctrine appears to exist in the law of any other country in Europe. The following is a clear judicial statement of it in its settled form: "A servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a * fellow-servant when he is [* 86] acting in the discharge of his duty as servant of him who is the common master of both" (*a*).

Reason given in the later cases.

The phrase "common employment" is frequent in this class of cases. But it is misleading in that it suggests a limitation of the rule to circumstances where the injured servant had in fact some opportunity of observ-

The servants need not be about the same kind of work:

(*y*) Farwell *v.* Boston and Worcester Railroad Corporation, 4 Met. 49.

(*z*) See Wilson *v.* Merry, L. R. 1 Se. & D. 326.

(*a*) Erle C. J. in Tunney *v.* Midland R. Co. (1866) L. R. 1 C. P. at p. 296; Archibald J. used very similar language in Lovell *v.* Howell (1876) 1 C. P. D. at p. 167.

ing and guarding against the conduct of the negligent one; a limitation rejected by the Massachusetts Court in Farwell's case, where an engine-driver was injured by the negligence of a switchman (pointsman, as we say on English railways) in the same company's service, and afterwards constantly rejected by the English Courts.

"When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other and beyond the reach of sight or voice, and yet acting together.

[* 87] * "Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connexion with those from whose negligence he might suffer, but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied" (*b*).

provided there is a

So it has been said that "we must not over-refine, but

(*b*) Shaw C. J., Farwell *v.* Boston, &c. Corporation, 4 Met. 49. M. Sainctelette of Brussels, and M. Sauzet of Lyons, whom he quotes (*op. cit.* p. 140), differ from the current view among French-speaking lawyers, and agree with Shaw C. J. and our Courts, in referring the whole matter to the contract between the master and servant; but they arrive at the widely different result of holding the master bound, as an implied term of the contract, to insure the servant against all accidents in the course of the service, and not due to the servant's own fault or *vis major*.

look at the common object, and not at the common immediate object" (*c*). All persons engaged under the same employer for the purpose of the same business, however different in detail those purposes may be are fellow-servants in a common employment within the meaning of this rule: for example, a carpenter doing work on the roof of an engine-shed and porters moving an engine on a turntable (*c*). "Where there is one common general object, in attaining which a servant is exposed to risk, he is not entitled to sue the master if he is injured by the negligence * of [* 88] another servant whilst engaged in furthering the same object' (*d*). general common object.

It makes no difference if the servant by whose negligence another is injured is a foreman, manager, or other superior in the same employment, whose orders the other was by the terms of his service bound to obey. The foreman or manager is only a servant having greater authority: foreman and workmen, of whatever rank, and however authority and duty may be distributed among them, are "all links in the same chain" (*e*). The master is bound, as between himself and his servants, to exercise due care in selecting proper and competent persons for the work (whether as fellow-workmen in the ordinary sense, or as superintendents or foremen), and to furnish suitable means and resources to accomplish the work (*f*), and he is not answerable further (*g*). Relative rank of the servants immaterial.

(*c*) Pollock C. B., Morgan *v.* Vale of Neath R. Co. (1865) Ex. Ch. L. R. 1 Q. B. 149, 155.

(*d*) Thesiger L. J., Charles *v.* Taylor, 3 C. P. D. 492, 498.

(*e*) Felton *v.* England (1866) L. R. 2 Q. B. 33; Wilson *v.* Merry (1868) L. R. 1 Sc. & D. 326: see per Lord Cairns at p. 333, and per Lord Colonsay at p. 345. The French word *collaborateur*, which does not mean "fellow-workman" at all, was at one time absurdly introduced into these cases, it is believed by Lord Brougham, and occurs as late as Wilson *v.* Merry.

(*f*) According to some decisions, which seem on principle doubtful, he is bound only not to furnish means or resources which are to his own knowledge defective: Gallagher *v.* Piper (1864) 16 C. B. N. S. 669; 33 L. J. C. P. 329. And quite lately it has been decided in the Court of Appeal that where a servant seeks to hold his master liable for injury caused by the dangerous condition of a building where he is employed, he must allege distinctly both that the master knew of the danger and that he, the servant, was ignorant of it: Griffiths *v.* London and St. Katharine's Dock Co., 13 Q. B. Div. 259.

(*g*) Lord Cairns, as above: to same effect Lord Wensleydale, Weems *v.* Mathieson (1861) 4 Macq. at p. 227: "All that the master is bound to do is to provide machinery fit and proper for the work and to take care to have it superintended by himself

Volunteer assistant is on same footing as servant.

[* 89] * Moreover, a stranger who gives his help without reward to a man's servants engaged in any work is held to put himself, as regards the master's liability towards him, in the same position as if he were a servant. Having of his free will (though not under a contract of service) exposed himself to the ordinary risks of the work and made himself a partaker in them, he is not entitled to be indemnified against them by the master any more than if he were in his regular employment (*h*).

Exception where the master interferes in person.

On the other hand, a master who takes an active part in his own work is not only himself liable to a servant injured by his negligence, but, if he has partners in the business, makes them liable also, For he is the agent of the firm, but not a servant (*i*): the partners are generally answerable for his conduct, yet cannot say he was a fellow-servant of the injured man.

Employers' Liability Act, 1880.

Such were the results arrived at by a number of modern authorities, which it seems useless to cite in more detail (*k*): the rule, though not abrogated, being greatly limited in application by the statute of 1880. This Act (43 & 44 Vict. c. 42) is on the face of it an experimental and empirical compromise between conflicting interests. It is temporary, being enacted only for seven years and the next session of Parliament; it [* 90] is confined in its operation * to certain specified causes of injury; and only certain kinds of servants are entitled to the benefit of it, and then upon restrictive conditions as to notice of action, mode of trial, and amount of compensation, which are unknown to the common law. The effect is that a "workman" within the meaning of the Act is put as against his employer in approximately (not altogether, I think) the same position as an outsider as regards the safe and fit condition of the material instruments, fixed or moveable,

---

or his workmen in a fit and proper manner." In Skipp *v.* E. C. R. Co. (1853) 9 Ex. 223; 23 L. J. Ex. 23, it was said that this duty does not extend to having a sufficient number of servants for the work: *sed qu.* The decision was partly on the ground that the plaintiff was in fact well acquainted with the risk and had never made any complaint.

(*h*) Potter *v.* Faulkner (1861) Ex. Ch. 1 B. & S. 800; 31 L. J. Q. B. 30, approving Degg *v.* Midland R. Co. (1857) 4 H. & N. 773; 26 L. J. Ex. 174.

(*i*) Ashworth *v.* Stanwix (1861) 3 E. & E. 701; 30 L. J. Q. B. 183.

(*k*) They are well collected by Mr. Horace Smith (Law of Negligence, pp. 73—76, 2nd ed.).

of the master's business. He is also entitled to compensation for harm incurred through the negligence of another servant exercising superintendence, or by the effect of specific orders or rules issued by the master or some one representing him; and there is a special wider provision for the benefit of railway servants, which virtually abolishes the master's immunity as to railway accidents in the ordinary sense of that term. So far as the Act has any principle, it is that of holding the employer answerable for the conduct of those who are in delegated authority under him. It is noticeable that almost all the litigation upon the Act has been caused either by its minute provisions as to notice of action, or by desperate attempts to evade those parts of its language which are plain enough to common sense. The text of the Act, and references to the decisions upon it, will be found in the Appendix (Note B).

Resulting complication of the law.

On the whole we have, in a matter of general public importance and affecting large classes of persons who are neither learned in the law nor well able to procure learned advice, the following singularly intricate and clumsy state of things.

First, there is the general rule of a master's liability for his servants (itself in some sense an exceptional rule to begin with).

* Secondly, the immunity of the master where [* 91] the person injured is also his servant.

Thirdly, in the words of the marginal notes of the Employers' Liability Act, "amendment of law" by a series of elaborate exceptions to that immunity.

Fourthly, "exceptions to amendment of law" by provisoes which are mostly but not wholly re-statements of the common law.

Fifthly, minute and vexatious regulations as to procedure in the cases within the first set of exceptions.

It is incredible that such a state of things should nowadays be permanently accepted either in substance or in form. This however is not the place to discuss the principles of the controversy, which I have attempted to do elsewhere (*l*). It does not appear that any similar controversy has taken place in the United

(*l*) Essays in Jurisprudence and Ethics (1882) ch. 5. See for very full information and discussion on the whole matter the evidence taken by the Select Committees of the House of Commons in 1876 and 1877 (Parl. Papers, H. C. 1876, 372; 1877, 285). And see the report of a Select Committee of the House of Commons on amending Bills, 1886, 192.

States, where the doctrine laid down by the Supreme Court of Massachusetts in Farwell's case has been very generally followed. Except in Massachusetts, however, an employer does not so easily avoid responsibility by delegating his authority, as to choice of servants or otherwise, to an intermediate superintendent (*m*). A collection of more or less detailed reports "on the laws regulating the liability of employers in foreign countries" has now been published by the Foreign Office (*n*).

(*m*) Cooley on Torts, 560; Shearman and Redfield, ss. 86, 88, 102. And see the late case of Chicago M. & S. R. Co. *v.* Ross (1884) 112 U. S. 377; and the Columbia, Jurist, ii. 554.

(*n*) Parl. Papers, Commercial, No. 21, 1886.

* CHAPTER IV. [* 92]

GENERAL EXCEPTIONS.

Conditions excluding liability for act *prima facie* wrongful.

We have considered the general principles of liability for civil wrongs. It now becomes needful to consider the general exceptions to which these principles are subject, or in other words the rules of immunity which limit the rules of liability. There are various conditions which, when present, will prevent an act from being wrongful which in their absence would be a wrong. Under such conditions the act is said to be justified or excused. And when an act is said in general terms to be wrongful, it is assumed that no such qualifying conditions exists. It is an actionable wrong, generally speaking, to lay hands on a man in the way of force or restraint. But it is the right of every man to defend himself against unlawful force, and it is the duty of officers of justice to apply force and restraint in various degrees, from simple arrest to the infliction of death itself, in execution of the process and sentences of the law. Here the harm done, and wilfully done, is justified. There are incidents, again, in every football match which an uninstructed observer might easily take for a confused fight of savages, and grave hurt sometimes ensues to one or more of the players. Yet, so long as the play is fairly conducted according to the rules agreed upon, there is no wrong and no cause of action. For the players have joined in the game of their own free will, and accepted its risks. Not that a man is bound to play football or any other rough game, but if he does he must abide its ordinary chances. Here the harm done, if not justified * (for, though, in a man- [*93] ner unavoidable, it was not in a legal sense necessary), is nevertheless excused (*a*). Again, defamation is a wrong; but there are certain occasions on which a man may with impunity make and publish untrue statements to the prejudice of another. Again, "sic utere tuo ut alienum non laedas" is said to be a precept of law; yet

(*a*) Justification seems to be the proper word when the harm suffered is inseparably incident to the performance of a legal duty or the exercise of a common right; excuse, when it is but an accident: but I do not know that the precise distinction is always possible to observe, or that anything turns on it.

there are divers things a man may freely do for his own ends, though he well knows that his neighbour will in some way be the worse for them.

General and particular exceptions.

Some of the principles by which liability is excluded are applicable indifferently to all or most kinds of injury, while others are confined to some one species. The rule as to "privileged communications" belongs only to the law of libel and slander, and must be dealt with under that particular branch of the subject. So the rule as to "contributory negligence" qualifies liability for negligence, and can be understood only in connexion with the special rules determining such liability. Exceptions like those of consent and inevitable accident, on the other hand, are of such wide application that they cannot be conveniently dealt with under any one special head. This class is aptly denoted in the Indian Penal Code (for the same or similar principle apply to the law of criminal liability) by the name of General Exceptions. And these are the exceptions which now concern us. The following seem to be their chief categories. An action is within certain limits not maintainable in respect of the acts of political power called "acts of state," nor of judicial acts. [* 94] Executive * acts of lawful authority form another similar class. Then a class of acts has to be considered which may be called quasi-judicial, and which, also within limits, are protected. Also, there are various cases in which unqualified or qualified immunity is conferred upon private persons exercising an authority or power specially conferred by law. We may regard all these as cases of privilege in respect of the person or the occasion. After these come exceptions which are more an affair of common right: inevitable accident (a point, strange to say, not clearly free from doubt), harm inevitably incident to the ordinary exercise of rights, harm suffered by consent or under conditions amounting to acceptance of the risk, and harm inflicted in self-defence or (in some cases) otherwise by necessity. These grounds of exemption from civil liability for wrongs have to be severally examined and defined. And first of "Acts of State."

1.—*Acts of State.*

Acts of State.

It is by no means easy to say what an act of state is, though the term is not of unfrequent occurrence. On

the whole, it appears to signify—(1) An act done or adopted by the prince or rulers of a foreign independent State in their political and sovereign capacity, and within the limits of their *de facto* political sovereignty; (2) more particularly (in the words of Mr. Justice Stephen (*b*)),"an act injurious to the person or to the property of some person who is not at the time of that act a subject (*c*) of her * Majesty; which act is [* 95] done by any representative of her Majesty's authority, civil or military, and is either previously sanctioned, or subsequently ratified by her Majesty" (such sanction or ratification being, of course, expressed in the proper manner through responsible ministers).

Our courts of justice profess themselves not competent to discuss acts of these kinds for reasons thus expressed by the Judicial Committe of the Privy Council: —"The transactions of independent States between each other" (and with subjects of other States), "are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make" (*d*). General ground of exemption.

A series of decisions of the Indian Supreme Courts and the Privy Council have applied this rule to the dealings of the East India Company with native States and with the property of native princes (*e*). In these cases the line between public and private property, between acts of regular administration and acts of war or of annexation, is not always easy to draw. Most of them turn on acts of political annexation. Persons who by such an act become British subjects do not thereby become entitled to complain in municipal courts deriving their authority from the British Government of the act of annexation itself or anything incident to it. In such a case the only remedy is by petition of right to the Crown. And the effect is the same if the act is originally an excess of authority, but is afterwards ratified by the Crown.

"The leading case on this subject is Buron *v.* Den-

(*b*) History of the Criminal Law, ii. 61.

(*c*) This includes a friendly alien living in "temporary allegiance" under the protection of English law: therefore an act of state in this sense cannot take place in England in time of peace.

(*d*) Secretary of State in Council of India *v.* Kamachee Boye Sahaba (1859) 13 Moo. P. C. 22, 75.

(*e*) See Doss *v.* Secretary of State of India in Council, 19 Eq. 509, and the case last cited.

[* 96] man (*f*). * This was an action against Captain Denman, a captain in the navy, for burning certain barracoons on the West Coast of Africa, and releasing the slaves contained in them. His conduct in so doing was approved by a letter written by Mr. Stephen, then Under Secretary of State for the Colonies, by the direction of Lord John Russel, then Secretary of State. It was held that the owner of the slaves [a Spanish subject] could recover no damages for his loss, as the effect of the ratification of Captain Denman's act was to convert what he had done into an act of state, for which no action would lie."

So far Mr. Justice Stephen, in his History of the Criminal Law (*g*). It is only necessary to add, as he does on the next page, that "as between the sovereign and his subjects there can be no such thing as an act of state. Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals. If one British subject puts another to death or destroys his property by the express command of the King, that command is no protection to the person who executes it unless it is in itself lawful, and it is the duty of the proper courts of justice to determine whether it is lawful or not": as, for example, when the Court of King's Bench decided that a Secretary of State had no power to issue general warrants to search for and seize papers and the like (*h*).

Local actions against viceroy or governor.

Another question which has been raised in the colonies and Ireland, but which by its nature cannot come before an English court for direct decision, is how far an action is maintainable against an officer in the nature of a viceroy during his term of office, and in the local courts of the territory in which he represents the [* 97] Crown. It has been * held by the Judicial Committee that the Lieutenant-Governor of a colony is not exenpt from suit in the courts of that colony for a debt or other merely private cause of action (*i*); and by the Irish courts, on the other hand, that the Lord-

(*f*) 2 Ex. 167.
(*g*) Vol. ii, p. 64.
(*h*) Entick *v.* Carrington, 19 St. Tr. 1043.
(*i*) Hill *v.* Bigge (1841) 3 Moo. P. C. 465; dissenting from Lord Mansfield's dictum in Mostyn *v.* Fabrigas, Cowp. 172, that "locally during his government *no civil or criminal action* will lie against him;" though it may be that he is privileged from personal arrest where arrest would, by the local law, be part of the ordinary process.

Lieutenant is exempt from being sued in Ireland for an act done in his official or "politic" capacity (*k*).

Acts of foreign powers.

There is another quite distinct point of jurisdiction in connexion with which the term "act of state" is used. A sovereign prince or other person representing an independent power is not liable to be sued in the courts of this country for acts done in a sovereign capacity; and this even if in some other capacity he is a British subject, as was the case with the King of Hanover, who remained an English peer after the personal union between the Crowns of England and Hanover was dissolved (*l*). This rule is included in a wider one which not only extends beyond the subject of this work, but belongs to international as much as to municipal law. It has been thus expressed by the Court of Appeal: "As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise, * by means of any of its [* 98] Courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador (*m*), though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction"(*n*).

Summary.

If we may generalize from the doctrine of our own courts, the result seems to be that an act done by the authority, previous or subsequent, of the government of a sovereign state in the exercise of *de facto* sovereignty (*o*), is not examinable at all in the courts of jus-

(*k*) Luby *v.* Wodehouse, 17 Ir. C. L. R. 618, Sullivan *v.* Spencer, Ir. R. 6 C. L. 173, following Tandy *v.* Westmoreland, 27 St. Tr. 1246. These cases go very far, for the Lord Lieutenant was not even called on to plead his privilege, but the Court stayed proceedings against him on motion. As to the effect of a local act of indemnity, see Philips *v.* Eyre, Ex. Ch. L. R. 6 Q. B. 1.

(*l*) Duke of Brunswick *v.* King of Hanover (1843-4) 6 Beav. 1, 57; affirmed in the House of Lords, 2 H. L. C. 1.

(*m*) What if cattle belonging to a foreign ambassador were distrained damage feasant? It would seem he could not get them back without submitting to the jurisdiction.

(*n*) The Parliament Belge (1880) 5 P. D. 197, 214.

(*o*) I have not met with a distinct statement of this qualification in existing authorities, but it is evidently assumed by them, and is necessary for the preservation of every state's sovereign rights within its own jurisdiction. Plainly the command of a

tice of any other state. So far forth as it affects persons not subject to the government in question, it is not examinable in the ordinary courts of that state itself. If and so far as it affects a subject of the same state, it may be, and in England it is, examinable by the courts in their ordinary jurisdiction. In most Continental countries, however, if not in all, the remedy for such acts must be sought before a special tribunal (in France the Conseil d'Etat: the preliminary question whether the ordinary court or the Conseil d'Etat has jurisdiction is decided by the Tribunal des Conflits, a peculiar and composite court) (*p*).

[* 99] * 2.—*Judicial Acts.*

Judicial acts. Next as to judicial acts. The rule is that "no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice" (*q*). And the exemption is not confined to judges of superior courts. It is founded on the necessity of judges being independent in the exercise of their office, a reason which applies equally to all judicial proceedings. But in order to establish the exemption as regards proceedings in the inferior court, the judge must show that at the time of the alleged wrong-doing some matter was before him in which he had jurisdiction (whereas in the case of a superior court it is for the plaintiff to prove want of jurisdiction); and the act complained of must be of a kind which he had power to do as judge in that matter.

Thus a revising barrister has power by statute (*r*) "to order any person to be removed from his court who shall interrupt the business of the court, or refuse to obey his lawful orders in respect of the same": but it is an actionable trespass if under colour of this power he causes a person to be removed from the court, not because that person is then and there making a disturbance, but because in the revising barrister's opinion he improperly suppressed facts within his knowledge at

foreign government would be no answer to an action for trespass to land, or for the arrest of an alleged offender against a foreign law, within the body of an English county.

(*p*) Law of May 24, 1872. But the principle is ancient, and the old law is still cited on various points.

(*q*) Scott *v.* Stansfield (1868) L. R. 3 Ex. 220, which confirms and sums up the effect of many previous decisions.

(*r*) 28 & 29 Vict. c. 36, s. 16.

the holding of a former court (*s*). The like law holds if a county court judge commits a party without jurisdiction, and being informed of the facts which show that he has no jurisdiction (*t*); though an inferior judge is not liable for an act which on * the facts ap- [* 100] parent to him at the time was within his jurisdiction, but by reason of facts not then shown was in truth outside it (*u*).

A judge is not liable in trespass for want of jurisdiction, unless he knew or ought to have known of the defect; and it lies on the plaintiff, in every such case, to prove that fact (*x*). And the conclusion formed by a judge acting judicially and in good faith, on a matter of fact which it is within his jurisdiction to determine, cannot be disputed in an action against him for anything judicially done by him in the same cause upon the footing of that conclusion (*y*).

Allegations that the act complained of was done "maliciously and corruptly," that words were spoken "falsely and maliciously," or the like will not serve to make an action of this kind maintainable against a judge either of a superior (*z*) or of an inferior (*a*) court.

Liability by statute in special cases.

There are two cases in which by statute an action does or did lie against a judge for misconduct in his office, namely, if he refuses to grant a writ of *habeas corpus* in vacation time (*b*), and if he refused to seal a bill of exceptions (*c*).

Judicial acts of persons not Judges.

The rule of immunity for judicial acts is applied not only to judges of the ordinary civil tribunals, but to members of naval and military courts-martial or courts of * inquiry constituted in accordance with [* 101] military law and usage (*d*). It is also applied to a limited

(*s*) Willis *v.* Maclachlan (1876) 1 Ex. D. 376.
(*t*) Houlden *v.* Smith (1850) 14 Q. B. 841; 19 L. J. Q. B. 170.
(*u*) Lowther *v.* Earl of Radnor (1806) 8 East, 113, 118.
(*x*) Calder *v.* Halket (1839) 3 Moo. P. C. 28, 78.
(*y*) Kemp *v.* Neville (1861) 10 C. B. N. S. 523; 31 L. J. C. P. 158 (an action against the Vice-Chancellor of the University of Cambridge), and authorities there cited.
(*z*) Frey *v.* Blackburn (1862) 3 B. & S. 576.
(*a*) Scott *v.* Stansfield (1868) L. R. 3 Ex. 220.
(*b*) 31 Car. 2, c. 2, s. 9.
(*c*) 13 Edw. 2 (Stat. Westm. 2) c. 31, cf. Blackstone, iii. 372.
(*d*) This may be collected from such authorities as Dawkins *v.* Lord Rokeby (1875) L. R. 7 H. L. 744, Dawkins *v.* Prince Edward of Saxe Weimar (1876) 1 Q. B. D. 499, which however go to some extent on the doctrine of "privileged communications,"

extent to arbitrators, and to any person who is in a position like an arbitrator's, as having been chosen by the agreement of parties to decide a matter that is or may be in difference between them. Such a person, if he acts honestly, is not liable for errors on judgment (*e*). He would be liable for a corrupt or partisan exercise of his office; but if he really does use a judicial discretion the rightness or competence of his judgment cannot be brought into question for the purpose of making him personally liable.

The doctrine of our courts on this subject appears to be fully and uniformly accepted in the United States (*f*).

3.—*Executive Acts.*

Executive acts.

As to executive acts of public officers, no legal wrong can be done by the regular enforcement of any sentence or process of law, nor by the necessary use of force for preserving the peace. It will be observed that private persons are in many cases entitled, and in some bound, to give aid and assistance, or to act by themselves, in [* 102] executing the * law; and in so doing they are similarly protected (*g*). Were not this the rule, it is evident that the law could not be enforced at all. But a public officer may err by going beyond his authority in various ways. When this happens (and such cases are not uncommon), there are distinctions to be observed. The principle which runs through both common law and legislation in the matter is that an officer is not protected from the ordinary consequence of unwarranted acts which it rested with himself to avoid, such as using needless violence to secure a prisoner; but he is protected if he has only acted in a manner in itself reasonable, and in execution of an apparently regular war-

---

a doctrine wider in one sense, and more special in another sense, than the rule now in question. Partly, also, they deal with acts of authority not of a judicial kind, which will be mentioned presently.

(*e*) Pappa *v.* Rose (1872) Ex. Ch. L. R. 7 C. P. 525 (broker authorized by sale note to decide on quality of goods); Tharsis Sulphur Co. *v.* Loftus (1872) L. R. 8 C. P. 1 (average adjuster nominated to ascertain proportion of loss as between ship and cargo); Stevenson *v.* Watson (1879) 4 C. P. D. 148 (architect nominated to certify what was due to contractor).

(*f*) Cooley on Torts, Ch. 14.

(*g*) The details of this subject belong to criminal law.

rant or order which on the face of it he was bound to obey (*h*). This applies only to irregularity in the process of a court having jurisdiction over the alleged cause. Where an order is issued by a court which has no jurisdiction at all in the subject-matter, so that the proceedings are, as it is said, "coram non judice," the exemption ceases (*i*). A constable or officer acting under a justice's warrant is, however, specially protected by statute, notwithstanding any defect of jurisdiction, if he produces the warrant on demand (*k*). Many particular statutes contain provisions which give a qualified protection to persons acting under the statute, by requiring notice of action to be given, or the action to be brought within a limited time, or both. It would serve no useful purpose to attempt a collection of such provisions, which are * important, and sometimes [* 103] intelligible, only in connexion with the special branches of public law in which they occur. (*l*).

As to a mere mistake of fact, such as arresting the body or taking the goods of the wrong person, an officer of the law is not excused in such a case. He must lay hands on the right person or property at his peril, the only exception being on the principle of estoppel, where he is misled by the party's own act (*m*).

Acts of naval and military officers.

Acts done by naval and military officers in the execution or intended execution of their duty, for the enforcement of the rules of the service and preservation of discipline, fall to some extent under this head. The justification of a superior officer as regards a subordinate party depends on the consent implied (or indeed expressed) in the act of a man's joining the service that he will abide by its regulations and usages; partly on the sanction expressly given to military law by statutes. There is very great weight of opinion, but

(*h*) Mayor of London *v.* Cox (1867) L. R. 2 H. L. at p. 269 (in opinion of judges, per Willes J). The law seems to be understood in the same way in the United States. Cooley on Torts, 459—462.

(*i*) The case of the Marshalsea, 10 Co. Rep. 76 a; Clark *v.* Woods (1848) 2 Ex. 395; 17 L. J. M. C. 189.

(*k*) 24 Geo. 2, c. 44, s. 6. (Action lies only if a demand in writing for perusal and copy of the warrant is refused or neglected for six days.)

(*l*) Cf. Dicey on Parties, 430. Sect. 170 of the Army Act, 1881, will serve as a recent specimen. Cf. the Indian Code of Civil Procedure (Act XIV. 1882), s. 424.

(*m*) See Glasspoole *v.* Young, 9 B. & C. 696; Dunston *v.* Paterson (1857) 2 C. B. N. S. 495; 26 L. J. C. P. 267; and other authorities collected in Fisher's Digest, ed. Mews, sub. tit. Sheriff.

no absolute decision, that an action does not lie in a civil court for bringing an alleged offender against military law (being a person subject to that law) before a court-martial without a probable cause (*n*). How far the orders of a superior officer justify a subordinate who obeys them as against third persons has never been fully settled. But the better opinion appears to be [* 104] that the subordinate is * in the like position with an officer executing an apparently regular civil process, namely, that he is protected if he acts under orders given by a person whom he is generally bound by the rules of the service to obey, and of a kind which that person is generally authorized to give, and if the particular order is not necessarily or manifestly unlawful (*o*).

Of other public authorities.

The same principles apply to the exemption of a person acting under the orders of any public body competent in the matter in hand. An action does not lie against the Serjeant-at-arms of the House of Commons for excluding a member from the House in obedience to a resolution of the House itself; this being a matter of internal discipline in which the House is supreme (*p*).

Indian Act, XVIII. of 1850.

The principles of English law relating to the protection of judicial officers and persons acting under their orders have in British India been declared by express enactment (Act XVIII of 1850).

4.—*Quasi-judicial Acts.*

Acts of quasi-judicial discretion.

Divers persons and bodies are called upon, in the management of public institutions or government of voluntary associations, to exercise a sort of coventional juris-

(*n*) Johnstone *v.* Sutton (1786–7) Ex. Ch. 1 T. R. 510, 548; affirmed in H. L. ibid. 784; 1 Bro. C. P. 76. The Ex. Ch. thought the action did not lie, but the defendant was entitled to judgment even if it did. No reasons appear to have been given in the House of Lords.

(*o*) See per Willes J. in Keighly *v.* Bell (1866) 4 F. & F. at p 790. In time of war the protection may perhaps be more extensive. As to criminal responsibility in such cases, cf. Stephen, Dig. Cr. Law, art. 202, Hist. Cr. Law, i. 200—206.

(*p*) Bradlaugh *v.* Gossett (1884) 12 Q. B. D. 271. As to the limits of the privilege, see per Stephen J. at p. 283. As to the power of a colonial legislative assembly over its own members, see Barton *v.* Taylor (J. C. 1886) 11 App. Ca. 197.

diction analogous to that of inferior courts of justice. These * quasi-judicial functions are in many cases [*105] created or confirmed by Parliament. Such are the powers of the universities over their officers and graduates, and of colleges in the universities over their fellows and scholars. Often the authority of the quasi-judicial body depends on an instrument of foundation, the provisions of which are binding on all persons who accept benefits under it. Such are the cases of endowed schools and religious congregations. And the same principle appears in the constitution of modern incorporated companies, and even of private partnerships. Further, a quasi-judicial authority may exist by the mere convention of a number of persons who have associated themselves for any lawful purpose, and have entrusted powers of management and discipline to select members. The committees of most clubs have by the rules of the club some such authority, or at any rate an initiative in presenting matters of discipline before the whole body. The Inns of Court exhibit a curious and unique example of great power and authority exercised by voluntary unincorporated societies in a legally anomalous manner. Their powers are for some purposes quasi-judicial, and yet they are not subject to any ordinary jurisdiction (*q*).

Rules of natural justice and special rules, if any, must be observed.

The general rule as to quasi-judicial powers of this class is that persons exercising them are protected from civil liability if they observe the rules of natural justice, and also the particular statutory or conventional rules, if any, which may prescribe their course of action. The rules of natural justice appear to mean, for this purpose, that a man is not to be removed from office or membership, or otherwise dealt with to his disadvantage, without having fair and sufficient notice of what is alleged against him, and an opportunity of making his defence; and that the decision, * whatever it [* 106] is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions be satisfied, a court of justice will not interfere, not even if it thinks the decision was in fact wrong (*r*). If not, the act complained of will be declared void, and the person affected by it maintained

(*q*) See Neate *v.* Denman (1874) 18 Eq. 127.

(*r*) Inderwick *v.* Snell (1850) 2 Mac. & G. 216 (removal of a director of a company); Dawkins *v.* Antrobus (1881) 17 Ch. Div. 615 (expulsion of a member from a club); cf. 13 Ch. D. 352.

in his rights until the matter has been properly and regularly dealt with (*s*). The principles apply to the expulsion of a partner from a private firm where a power of expulsion is conferred by the partnership contract (*t*).

Absolute discretionary powers.

It may be, however, that by the authority of Parliament (or, it would seem, by the previous agreement of the party to be affected) a governing or administrative body, or the majority of an association, has power to remove a man from office or the like without anything in the nature of judicial proceedings, and without showing any cause at all. Whether a particular authority is judicial or absolute must be determined by the terms of the particular instrument creating it (*u*).

Questions whether duty judicial or ministerial: Ashby *v.* White, &c.

On the other hand there may be question whether the duties of a particular office be quasi-judicial, or merely [* 107] * ministerial, or judicial for some purposes and ministerial for others. It seems that at common law the returning or presiding officer at a parliamentary or other election has a judicial discretion, and does not commit a wrong if by an honest error of judgment he refuses to receive a vote (*x*): but now in most cases it will be found that such officers are under absolute statutory duties (*y*), which they must perform at their peril.

(*s*) Fisher *v.* Keane (1878) 11 Ch. D. 353 (a club case, no notice to the member); Labouchere *v.* Wharncliffe (1879) 13 Ch. D. 346 (the like, no sufficient inquiry or notice to the member, calling and proceedings of general meeting irregular); Dean *v.* Bennett (1870) 6 Ch. 489 (minister of Baptist chapel under deed of settlement, no sufficient notice of specific charges either to the minister or in calling special meeting).

(*t*) Blisset *v.* Daniel, 10 Ha. 493; Wood *v.* Woad (1874) L. R. 9 Ex. 190. Without an express power in the articles a partner cannot be expelled at all.

(*u*) *E. g.* Dean *v.* Bennett, *supra* (power judicial); Hayman *v.* Governors of Rugby School (1874) 18 Eq. 28 (power absolute).

(*x*) Tozer *v.* Child (1857) Ex. Ch. 7 E. & B. 377; 26 L. J. Q. B. 151; explaining Ashby *v.* White, Ld. Raym. 938, and in 1 Sm. L. C.; and see the special report of Holt's judgment published in 1837 and referred to in Tozer *v.* Child. There is some difference of opinion in America, see Cooley on Torts, 413, 414.

(*y*) 6 & 7 Vict. c. 18, s. 82. As to presiding officers under The Ballot Act, 1872, Pickering *v.* James (1873) L. R. 8 C. P. 489; Ackers *v.* Howard (1886) 16 Q. B. D. 739.

5.—*Parental and quasi-parental Authority.*

Authority of parents and persons *in loco parentis.*

Thus much of private quasi-judicial authority. There are also several kinds of authority in the way of summary force or restraint which the necessities of society require to be exercised by private persons. And such persons are protected in exercise thereof, if they act with good faith and in a reasonable and moderate manner. Parental authority (whether in the hands of a father or guardian, or of a person to whom it is delegated, such as a school-master) is the most obvious and universal instance (*z*). It is needless to say more of this here, except that modern civilization has considerably diminished the latitude of what judges or juries are likely to think reasonable and moderate correction (*a*).

Of custodians of lunatics, &c.

* Persons having the lawful custody of a [* 108] lunatic, and those acting by their direction, are justified in using such reasonable and moderate restraint as is necessary to prevent the lunatic from doing mischief to himself or others, or required, according to competent opinion, as part of his treatment. This may be regarded as a quasi-paternal power; but I conceive the person intrusted with it is bound to use more diligence in informing himself what treatment is proper than a parent is bound (I mean, can be held bound in a court of law) to use in studying the best method of education. The standard must be more strict as medical science improves. A century ago lunatics were beaten, confined in dark rooms, and the like. Such treatment could not be justified now, though then it would have been unjust to hold the keeper criminally or civilly liable for not having more than the current wisdom of experts. In the case of a drunken man, or one deprived of self-control by a fit or other accident, the use of moderate restraint, as well for his own benefit as to prevent him from doing mischief to others, may in the same way be justified.

6.—*Authorities of Necessity.*

Of the master of a ship.

The master of a merchant ship has by reason of necessity the right of using force to preserve order and dis-

(*z*) Blackstone, i. 452. See modern examples collected in Addison on Torts, 5th ed. p. 129.

(*a*) The ancient right of a husband to beat his wife moderately (F. N. B. 80 F. 239 A.) was discredited by Blackstone (i. 445) and is not recognized at this day; but as a husband and wife cannot in any case sue one another for assault in a civil court, this does not concern us.

cipline for the safety of the vessel and the persons and property on board. Thus, if he has reasonable cause to believe that any sailor or passenger is about to raise a mutiny, he may arrest and confine him. The master [* 109] may even be justified * in a case of extreme danger in inflicting punishment without any form of inquiry. But "in all cases which will admit of the delay proper for injury, due inquiry should precede the act of punishment; and . . . . the party charged should have the benefit of that rule of universal justice, of being heard in his own defence" (*b*). In fact, when the immediate emergency of providing for the safety and discipline of the ship is past, the master's authority becomes a quasi-judicial one. There are conceivable circumstances in which the leader of a party on land, such as an Alpine expedition, might be justified on the same principle in exercising compulsion to assure the common safety of the party. But such a case, though not impossible, is not likely to occur for decision.

7.—*Damage incident to authorized Acts.*

Damage incidentally resulting from act not unlawful.

Thus far we have dealt with cases where some special relation of the parties justifies or excuses the intentional doing of things which otherwise would be actionable wrongs. We now come to another and in some respects a more interesting and difficult category. Damage suffered in consequence of an act done by another person, not for that intent, but for some other purpose of his own, and not in itself unlawful, may for various reasons be no ground of action. The general precept of law is commonly stated to be "Sic utere tuo ut alienum non laedas." If this were literally and universally applicable, a man would act at his peril whenever and where- [* 110] ver he acted otherwise than as * the servant of the law. Such a state of things would be intolerable. It would be impossible, for example, to build or repair a wall, unless in the middle of an uninhabited plain. But the precept is understood to be subject to large exceptions. Its real use is to warn us against the abuse of the more popular adage that "a man has a

---

(*b*) Lord Stowell, The Agincourt (1824) 1 Hagg. 271, 274. This judgment is the classical authority on the subject. For further references see Maude and Pollock's Merchant Shipping, 4th ed. i. 127.

right to do as he likes with his own" (*c*), which errs much more dangerously on the other side.

There are limits to what a man may do with his own; and if he does that which may be harmful to his neighbour, it is his business to keep within those limits. Neither the Latin nor the vernacular maxim will help us much, however, to know where the line is drawn. The problems raised by the apparent opposition of the two principles must be dealt with each on its own footing. We say apparent; for the law has not two objects, but one, that is, to secure men in the enjoyment of their rights and of their due freedom of action. In its most general form, therefore, the question is, where does the sphere of a man's proper action end, and aggression on the sphere of his neighbour's action begin?

Damage from execution of authorized works.

The solution is least difficult for the lawyer when the question has been decided in principle by a sovereign legislature. Parliament has constantly thought fit to direct or authorize the doing of things which but for that direction and authority might be actionable wrongs. Now a man cannot be held a wrong-doer in a court of law for acting in conformity with the direction or allowance of the supreme legal power in the State. In other words "no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it * does occasion damage to [* 111] any one." The meaning of the qualification will appear immediately. Subject thereto, "the remedy of the party who suffers the loss is confined to recovering such compensation" (if any) "as the Legislature has thought fit to give him" (*d*). Instead of the ordinary question whether a wrong has been done, there can only be a question whether the special power which has been exercised is coupled, by the same authority that created it, with a special duty to make compensation for incidental damage. The authorities on this subject are voluminous and discursive, and exhibit notable differences of opinion. Those differences, however, turn chiefly on the application of admitted principles to particular facts, and on the construction of particular enactments. Thus it has been disputed whether the

(*c*) Cf. Gaius (D. 50. 17, de div. reg. 55): "Nullus videtur dolo facere, qui suo iure utitur."

(*d*) Lord Blackburn, Geddis *v.* Proprietors of Bann Reservoir (1878) 3 App. Ca. at p. 455; Caledonian R. Co. *v.* Walker's Trustees (1882) 7 App. Ca. at p. 293; Mersey Docks Trustees *v.* Gibbs, L. R. 1 H. L. at p. 112.

compensation given by statute to persons who are "injuriously affected" by authorized railway works, and by the same statutes deprived of their common-law rights of action, was or was not co-extensive with the rights of action expressly or by implication taken away; and it has been decided, though not without doubts and weighty dissent, that in some cases a party who has suffered material loss is left without either ordinary or special remedy (*e*).

No action for unavoidable damage.

Apart from the question of statutory compensation, it is settled that no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner. A person dwelling near a railway constructed under the authority of Parliament for the purpose of being worked [* 112] by locomotive * engines cannot complain of the noise and vibration caused by trains passing and repassing in the ordinary course of traffic, however unpleasant he may find it (*f*); nor of damage caused by the escape of sparks from the engines, if the company has used due caution to prevent such escape so far as practicable (*g*). So, where a corporation is empowered to make a river navigable, it does not thereby become bound to keep the bed of the river clear beyond what is required for navigation, though an incidental result of the navigation works may be the growth of weeds and accumulation of silt to the prejudice of riparian owners (*h*).

Care and caution required in

But in order to secure this immunity the powers conferred by the Legislature must be exercised without

(*e*) Hammersmith R. Co. *v.* Brand (1869) L. R. 4 H. L. 171.

(*f*) Hammersmith R. Co. *v.* Brand, *supra*, confirming and extending Rex *v.* Pease (1832) 4 B. & Ad. 30, where certain members and servants of the Stockton and Darlington Railway Company were indicted for a nuisance to persons using a high road near and parallel to the railway. Lord Bramwell must have forgotten this authority when he said in the Court of Appeal that Rex *v.* Pease was wrongly decided (5 Q. B. D. 601).

(*g*) Vaughan *v.* Taff Vale R. Co. (1860) Ex. Ch. 5 H. & N. 679; 29 L. J. Ex. 247. See below in Ch. XII.

(*h*) Cracknell *v.* Corporation of Thetford (1869) L. R. 4 C. P. 629, decided partly on the ground that the corporation were not even entitled to enter on land which did not belong to them to remove weeds, &c., for any purposes beyond those of the navigation. A rather similar case, but decided the other way in the last resort on the construction of the particular statute there in question, is Geddis *v.* Proprietors of Bann Reservoir, 3 App. Ca. 430. Cracknell's case seems just on the line; cp. Biscoe *v.* G. E. R. Co. below.

negligence, or, as it is perhaps better expressed, with judgment and caution (*i*). For damage which could not have been avoided by any reasonably practicable care on the part of those who are authorized to exercise the power, there is no right of action. But they must not do needless * harm; and if they do, it is a [* 113] wrong against which the ordinary remedies are available. If an authorized railway comes near my house, and disturbs me by the noise and vibration of the trains, it may be a hardship to me, but it is no wrong. For the railway was authorized and made in order that trains might be run upon it, and without noise and vibration trains cannot be run at all. But if the company makes a cutting, for example, so as to put my house in danger of falling, I shall have my action; for they need not bring down my house to make their cutting. They can provide support for the house, or otherwise conduct their works more carefully. "When the company can construct its works without injury to private rights, it is in general bound to do so" (*k*). Hence there is a material distinction between cases where the Legislature "directs that a thing shall at all events be done" (*l*), and those where it only gives a discretionary power with choice of times and places. Where a discretion is given, it must be exercised with regard to the common rights of others. A public body which is by the statute empowered to set up hospitals within a certain area, but not empowered to set up a hospital on any specified site, or required to set up any hospital at all, is not protected from liability if a hospital established under this power is a nuisance to the neighbors (*m*). And even where a particular thing is required to be done, the burden of proof is on the person who has to do it to show that it cannot be done without creating a nuisance (*n*). A railway company is authorized to acquire land within specified limits, and on any part of that land to erect workshops. This does not justify the * com- [* 114] pany, as against a particular householder, in building workshops so situated (though within the authorized limits) that the smoke from them is a nuisance to him

exercise of discretionary powers.

(*i*) Per Lord Truro, L. & N. W. R. Co. *v.* Bradley (1851) 3 Mac. & G. at p. 341.

(*k*) Biscoe *v.* G. E. R. Co. (1873) 16 Eq. 636.

(*l*) 6 App. Ca. 203.

(*m*) Metropolitan Asylum District *v.* Hill (1881) 6 App. Ca. 193.

(*n*) Attorney-General *v.* Gaslight and Coke Co. (1877) 7 Ch. D. 217, 221.

in the occupation of his house (*o*). But a statutory power to carry cattle by railway, and provide station yards and other buildings for the reception of cattle and other things to be carried (without specification of particular places or times) is incidental to the general purposes for which the railway was authorized, and the use of a piece of land as a cattle yard under this power, though such as would be a nuisance at common law, does not give any right of action to adjoining occupiers (*p*). Such a case falls within the principle not of Metropolitan Asylum District *v.* Hill, but of Rex *v.* Pease.

A gas company was authorized by statute to have its pipes laid under certain streets, and was required to supply gas to the inhabitants. The vestry, being charged by statute with the repair of the streets, but not required or authorized to use any special means, used steam rollers of such weight that the company's pipes were often broken or injured by the resulting pressure through the soil. It was held that, even if the use of such rollers was in itself the best way of repairing the streets in the interest of the ratepayers and the public, the act of the vestry was wrongful as against the gas company, and was properly restrained by injunction (*q*).

[* 115] * "An Act of Parliament may authorize a nuisance, and if it does so, then the nuisance which it authorizes may be lawfully committed. But the authority given by the Act may be an authority which falls short of authorizing a nuisance. It may be an authority to do certain works provided that they can be done without causing a nuisance, and whether the authority falls within that category is again a question of construction. Again the authority given by Parliament may be to carry out the works without a nuisance, if they can be so carried out, but in the last resort to authorize a nuisance if it is necessary for the construction of the works" (*r*).

(*o*) Rajmohun Bose *v.* East India R. Co. (High Court, Calcutta), 10 Ben. L. R. 241. *Qu.* whether this be consistent with the case next cited.

(*p*) London and Brighton R. Co. *v.* Truman (1885) 11 App. Ca. 45, reversing the decision of the Court of Appeal, 29 Ch. Div. 89.

(*q*) Gas Light and Coke Co. *v.* Vestry of St. Mary Abbott's, (1885) 15 Q. B. Div.1. The Court also relied, but only by way of confirmation, on certain special Acts dealing with the relations between the vestry and the company. See at p. 6.

(*r*) Bowen L. J., 29 Ch. D. at p. 108.

An authority accompanied by compulsory powers, or to be exercised concurrently with authorities *ejusdem generis* which are so accompanied, will, it seems, be generally treated as absolute; but no single test can be assigned as decisive (*s*).

8.—*Inevitable Accident.*

Inevitable accident resulting from lawful act.

In the case we have just been considering the act by which the damage is caused has been specially authorized. Let us now turn to the class of cases which differ from these in that the act is not specially authorized, but is simply an act which, in itself, a man may lawfully do then and there; or (it is perhaps better to say) which he may do without breaking any positive law. We shall assume from the first that there is no want of reasonable care on the actor's part. For it is undoubted that if by failure in due care I cause harm to another, however * innocent my intention, I am [* 116] liable. This has already been noted in a general way (*t*). No less is it certain, on the other hand, that I am not answerable for mere omission to do anything which it was not my specific duty to do.

It is true that the very fact of an accident happening is commonly some evidence, and may be cogent evidence, of want of due care. But that is a question of fact, and there remain many cases in which accidents do happen notwithstanding that all reasonable and practicable care is used. Even the "consummate care" of an expert using special precaution in a matter of special risk or importance is not always successful. Slight negligence may be divided by a very fine line from unsuccessful diligence. But the distinction is real, and we have here to do only with the class of cases where the facts are so given or determined as to exclude any negligence whatever.

Conditions of the inquiry.

The question, then, is reduced to this, whether an action lies against me for harm resulting by inevitable accident from an act lawful in itself, and done by me in a reasonable and careful manner. Inevitable accident is not a verbally accurate term, but can hardly mislead; it does not mean absolutely inevitable (for, by the sup-

(*s*) See especially Lord Blackburn's opinion in London and Brighton R. Co. *v.* Truman.

(*t*) P. 32, above.

position, I was not bound to act at all), but it means not avoidable by any such precaution as a reasonable man, doing such an act then and there, could be expected to take. In the words of Chief Justice Shaw of Massachusetts, it is an accident such as the defendant could not have avoided by use of the kind and degree of care necessary to the exigency, and in the circumstances, in which he was placed.

On principle such accident excludes liability.

It may seem to modern readers that only one solution of the problem thus stated is possible, or rather [* 117] that there * is no problem at all (*u*). No reason is apparent for not accepting inevitable accident as an excuse. It is true that we may suppose the point not to have been considered at all in an archaic stage of law, when legal redress was but a mitigation of the first impulse of private revenge. But private revenge has disappeared from our modern law; moreover we do not nowadays expect a reasonable man to be angry without inquiry. He will not assume, in a case admitting of doubt, that his neighbour harmed him by design or negligence. And one cannot see why a man is to be made an insurer of his neighbour against harm which (by our hypothesis) is no fault of his own. For the doing of a thing lawful in itself with due care and caution cannot be deemed any fault. If the stick which I hold in my hand, and am using in a reasonable manner and with reasonable care, hurts my neighbour by pure accident, it is not apparent why I should be liable more than if the stick had been in another man's hand (*x*). If we go far back enough, indeed, we shall find a time and an order of ideas in which the thing itself that does damage is primarily liable, so to speak, and through the thing its owner is made answerable. That order of ideas was preserved in the noxal actions of Roman law, and in our own criminal law by the for- [* 118] feiture of the offending object * which had

(*u*) This, at any rate, is the view of modern juries: see Nichols *v.* Marsland (1875) L. R. 10 Ex. at p. 256; Holmes *v.* Mather, *ib.* at p. 262.

(*x*) Trespass for assault by striking the plaintiff with a stick thrown by the defendant. Plea, not guilty. The jury were directed that, in the absence of evidence for what purpose the defendant threw the stick, they might conclude it was for a proper purpose, and the striking the plaintiff was a mere accident for which the defendant was not answerable: Alderson *v.* Waistell (1844) 1 C. & K. 358 (before Rolfe B.). This, if it could be accepted, would prove more than is here contended for. But it is evidently a rough and ready summing-up given without reference to the books.

moved, as it was said, to a man's death, under the name of deodand. But this is a matter of history, not of modern legal policy. So much we may concede, that when a man's act is the apparent cause of mischief, the burden of proof is on him to show that the consequence was not one which by due diligence he could have prevented (*y*). But so does (and must) the burden of proving matter of justification or excuse fall in every case on the person taking advantage of it. If he were not, on the first impression of the facts, a wrong-doer, the justification or excuse would not be needed.

Apparent conflict of authorities.

We believe that our modern law supports the view now indicated as the rational one, that inevitable accident is not a ground of liability. But there is a good deal of appearance of authority in the older books for the contrary proposition that a man must answer for all direct consequences of his voluntary acts at any rate, or as Judge O. W. Holmes (*z*) has put it "acts at his peril." And such was the current opinion of English lawyers until the beginning of this century, if not later. On the other hand, it will be seen on careful examination that no actual decision goes the length of the dicta which embodies this opinion. In almost every case the real question turns out to be of the form of action or pleading. Moreover, there is no trace of any such doctrine (that I can find or hear of at least) in Roman or Continental jurisprudence (*a*); and this, although * for us not conclusive or even authoritative, [* 119] is worth considering whenever our own authorities admit of doubt on a point of general principle. And. what is more important for our purpose, the point has

(*y*) Shaw C. J. would not concede even this in the leading Massachusetts case of Brown *v.* Kendall, 6 Cush. at p. 297.

(*z*) See on the whole of this matter Mr. Justice Holmes's chapter on "Trespass and Negligence."

(*a*) "Inpunitus est qui sine culpa et dolo malo casu quodam damnum committit." Gai. 3. 211. Paulus indeed says (D. 9. 2, ad legem Aquiliam, 45, § 4), "Si defendendi mei causa lapidem in adversarium misero, sed non eum sed praetereuntem percussero, tenebor lege Aquilia; illum enim solum qui vim infert ferire conceditur." But various explanations of this are possible. Perhaps it shows what kind of cases are referred to by the otherwise unexplained dictum of Ulpian in the preceding fragment, "in lege Aquilia et levissima culpa venit." Paulus himself says there is no *iniuria* if the master of a slave, meaning to strike the slave, accidentally strikes a free man: D. 47, 10, de iniuriis, 4. According to the current English theory of the 16th—18th centuries an action on the case would not lie on such facts, but trespass *vi et armis* would.

been decided in the sense here contended for by Courts of the highest authority in the United States. To these decisions we shall first call attention.

American decisions: The Nitro-glycerine Case.

In the Nitro-glycerine Case (*b*) the defendants, a firm of carriers, received a wooden case at New York to be carried to California. "There was nothing in its appearance calculated to awaken any suspicion as to its contents," and in fact nothing was said or asked on that score. On arrival at San Francisco it was found that the contents (which "had the appearance of sweet oil") were leaking. The case was then according to the regular course of business, taken to the defendants' offices (which they rented from the plaintiff) for examination. A servant of the defendants proceeded to open the case with a mallet and chisel. The contents, being in fact nitro-glycerine, exploded. All the persons present were killed, and much property destroyed and the building damaged. The action was brought by the landlord for this last-mentioned damage, including that suffered by parts of the building let to other tenants as well as by the offices of the defendants. Nitro-glycerine had not then (namely in 1866) become a generally known article of commerce, nor were its [* 120] * properties well known. It was found as a fact that the defendants had not, nor had any of the persons concerned in handling the case, knowledge or means of knowledge of its dangerous character, and that the case had been dealt with "in the same way that other cases of similar appearance were usually received and handled, and in the mode that men of prudence engaged in the same business would have handled cases having a similar appearance in the ordinary course of business when ignorant of their contents." The defendants admitted their liability as for waste as to the premises occupied by them (which in fact they repaired as soon as possible after the accident), but disputed it as to the rest of the building.

Doctrine of Supreme Court; no liability for accidental result of lawful act without negligence.

The Circuit Court held that the defendants were not further liable than they had admitted, and the Supreme Court of the United States affirmed the judgment. It was held that in the first place the defendants were not bound to know, in the absence of reasonable grounds of suspicion, the contents of packages offered them for carriage: and next, that without such knowledge in fact

(*b*) 15 Wall. 524 (1872).

and without negligence they were not liable for damage caused by the accident (*c*). "No one is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business. . . . . The measure of care against accident which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own."

Brown *v.* Kendall (Massachusetts).

The Court proceeded to cite with approval the case of Brown *v.* Kendall in the Supreme Court of Massachusetts (*d*). * There the plaintiff's and the [* 121] defendant's dogs were fighting: the defendant was beating them in order to separate them, and the plaintiff looking on. "The defendant retreated backwards from before the dogs, striking them as he retreated; and as he approached the plaintiff, with his back towards him, in raising his stick over his shoulder in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury." The action was trespass for assault and battery. It was held that the act of the defendant in itself was a lawful and proper act which he might do by proper and safe means;" and that if "in doing this act, using due care and all proper precautions necessary to the exigency of the case to avoid hurt to others, in raising his stick for that purpose he accidentally hit the plaintiff in the eye and wounded him, this was the result of pure accident, or was involuntary and unavoidable (*e*), and therefore the action would not lie." All that could be required of the defendant was "the exercise of due care adapted to the exigency of the case." The rule in its general form was thus expressed: "If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom."

Other American cases: contrary

There have been like decisions in the Supreme Courts of New York (*f*) and Connecticut. And these rulings appear to be accepted as good law throughout the Uni-

(*c*) The plaintiff's proper remedy would have been against the consignor who despatched the explosive without informing the carriers of its nature. See Lyell *v.* Ganga Dai (1875) Indian Law Rep. 1 All. 60.

(*d*) 6 Cush. 292 (1850).

(*e*) The *consequence* was involuntary or rather unintended, though the act itself was voluntary; and it was also unavoidable, *i. e.*, not preventable by reasonable diligence.

(*f*) Harvey *v.* Dunlap, Lalor 193, cited 15 Wall. 539; Morris *v.* Platt, 32 Conn. 75.

opinion in Castle *v.* Duryee (N. Y.).

ted States (*g*). The general agreement of American authority and opinion is disturbed, indeed, by one re- [* 122] cent case in the * Court of Appeal of New York, that of Castle *v.* Duryee (*h*). But the conflicting element is not in the decision itself, nor in anything necessary to it. The defendant was the colonel of a regiment of New York militia, who at the time of the cause of action were firing blank cartridge under his immediate orders in the course of a review. The plaintiff was one of a crowd of spectators who stood in front of the firing line and about 350 feet from it. Upon one of the discharges the plaintiff was wounded by a bullet, which could be accounted for only by one of the men's pieces having by some misadventure been loaded with ball cartridge. It appeared that one company had been at target practice an hour or two before, and that at the end of the practice arms had been examined in the usual way (*i*), and surplus ammunition collected. Moreover, arms had again been inspected by the commanding officers of companies, in pursuance of the colonel's orders, before the line was formed for the regimental parade. The plaintiff sued the defendant in an action "in the nature of trespass for an assault." A verdict for the plaintiff was ultimately affirmed on appeal, the Court being of opinion that there was evidence of negligence. Knowing that some of the men had within a short time been in possession of ball ammunition, the defendant might well have done more. He might have cleared the front of the line before giving orders to fire. The Court might further have supported its decision, though it did not, by the cases which show that more than ordinary care, nay "consummate caution" (*j*), is required of persons dealing with dangerous weapons. The Chief Judge [* 123] added that, as the injury * was the result of an act done by the defendant's express command, the question of negligence was immaterial. But this was only the learned judge's individual opinion. It was not necessary to the decision, and there is nothing to show that the rest of the Court agreed to it (*k*).

(*g*) Cooley on Torts, 80.

(*h*) 2 Keys, 169 (1865).

(*i*) It will be remembered that this was in the days of muzzle-loaders. A like accident, however, happened quite lately at an Aldershot field-day, fortunately without hurt to any one.

(*j*) Erle, C. J. *obiter*, in Potter *v.* Faulkner, 1 B. & S. at p. 805; Dixon *v.* Bell, 5 M. & S. 198.

(*k*) The reporter adds this significent note: "The Court did not pass upon the first branch of the case, discussed by the Chief

We may now see what the English authorities amount to. They have certainly been supposed to show that inevitable accident is no excuse when the immediate result of an act is complained of. Erskine said a century ago in his argument in the celebrated case of the Dean of St. Asaph (*l*) (and he said it by way of a familiar illustration of the difference between criminal and civil liability) that "if a man rising in his sleep walks into a china shop and breaks everything about him, his being asleep is a complete answer to an *indictment* for trespass (*m*), but he must answer in an *action* for everything he has broken." And Bacon had said earlier to the same purpose, that "if a man be killed by misadventure, as by an arrow at butts, this hath a pardon of course: but if a man be hurt or maimed only, an action of trespass lieth, though it be done against the party's mind and will" (*n*). Stronger examples could not well be propounded. For walking in one's sleep is not a voluntary act at all, though possibly an act that might have been prevented: and the practice of archery was, when Bacon wrote, a positive legal duty under statutes * as recent as Henry VIII.'s time, though on [* 124] the other hand shooting is an extra-hazardous act (*o*). We find the same statement about accidents in shooting at a mark in the so-called laws of Henry I. (a compilation of the latter part of the 12th century) (*p*), and in the arguments of counsel in a case in the Year-Book of Edward IV., where the general question was more or less discussed (*q*). Brian (then at the bar) gave in illustration a view of the law exactly contrary to that which was taken in Brown *v.* Kendall. But the decision was only that if A. cuts his hedge so that the cut-

English authorities: cases of trespass and shooting.

Judge, as to the question of the general liability of the commanding officer."

(*l*) 21 St. Tr. 1022 (A. D. 1783).

(*m*) Would an indictment ever lie for simple trespass? I know not of any authority that it would though the action of trespass originally had, and retained in form down to modern times, a public and penal character.

(*n*) Maxims of the Law, Reg. 7, following the dictum of Rede J. in 21 Hen. VII. 28. We cite Bacon, not as a writer of authority, but as showing, like Erskine, the average legal mind of his time.

(*o*) O. W. Holmes 103.

(*p*) C. 88, § 6. "Si quis in ludo sagittandi vel alicuius exercitii iaculo vel huiusmodi casu aliquem occidat, reddat eum; legis enim est, qui inscienter peccat, scienter emendet."

(*q*) 6 Ed. IV. 7, pl. 18; O. W. Holmes 85; cf. 21 Hen. VII. 27, pl. 5, a case of trespass to goods which does not really raise the question.

tings *ipso invito* fall on B.'s land, this does not justify A. in entering on B.'s land to carry them off. And by Choke C. J. it is said, not that (as Brian's view would require) A. must keep his thorns from falling on B.'s land at all events, but that "he ought to show that he could not do it in any other way, or that he did all that was in his power to keep them out."

Weaver *v.* Ward.

Another case usually cited is Weaver *v.* Ward (*r*). The plaintiff and the defendant were both members of a trainband exercising with powder, and the plaintiff was hurt by the accidental discharge of the defendant's piece. It is a very odd case to quote for the doctrine of absolute liability, for what was there holden was that in trespass no man shall be excused, "except it may be judged utterly without his fault;" and the defendant's plea was held bad because it only denied intention, and did not properly bring before the Court the question whether the accident was inevitable. A later case (*s*), [* 125] which professes to follow * Weaver *v.* Ward, really departs from it in holding that "unavoidable *necessity*" must be shown to make a valid excuse. This in turn was apparently followed in the next century, but the report is too meagre to be of any value (*t*).

All these, again, are shooting cases, and if they occurred at this day the duty of using extraordinary care with dangerous things would put them on a special footing. In the celebrated squib case they are cited and more or less relied upon (*u*). It is not clear to what extent the judges intended to press them. According to Wilson's report, inevitable accident was allowed by all the judges to be an excuse. But Blackstone's judgment, according to his own report, says that nothing but "inevitable necessity" will serve, and

(*r*) Hob. 134, A. D. 1616.

(*s*) Dickeson *v.* Watson, Sir T. Jones, 205, A. D. 1682. Lambert *v.* Bessey, T. Raym. 421, a case of false imprisonment in the same period, cites the foregoing authorities, and Raymond's opinion certainly assumes the view that inevitable accident is no excuse even when the act is one of lawful self-defence. But then Raymond's opinion is a dissenting one: *S. C.* nom. Bessey *v.* Olliot, T. Raym. 467: being given in the former place alone and without explanation, it has apparently been sometimes taken for the judgment of the Court. At most, therefore, his illustrations are evidence of the notions current at the time.

(*t*) Underwood *v.* Hewson, 1 Strange 596, A. D. 1723 (defendant was uncocking a gun, plaintiff looking on). It looks very like contributory negligence, or at any rate voluntary exposure to the risk, on the plaintiff's part. But the law of negligence was then quite undeveloped.

(*u*) Scott *v.* Shepherd (1773) 2 W. Bl. 892; 3 Wils. 403.

adopts the argument of Brian in the case of the cut thorns, mistaking it for a judicial opinion; and the other judgments are stated as taking the same line, though less explicitly. For the decision itself the question is hardly material, though Blackstone may be supposed to represent the view which he thought the more favourable to his own dissenting judgment. His theory was that liability in trespass (as distinguished from an action on the case) is * unqualified as regards [* 126] the immediate consequences of a man's act, but also is limited to such consequences.

Leame v. Bray.

Then comes Leame *v.* Bray (*x*), a comparatively modern case, in which the defendant's chaise had run into the plaintiff's curricle on a dark night. The defendant was driving on the wrong side of the road; which of itself is want of due care, as every judge would now tell a jury as a matter of course. The decision was that the proper form of action was trespass and not case. Grose J. seems to have thought inevitable accident was no excuse, but this was extra-judicial. Two generations later, in Rylands *v.* Fletcher, Lord Cranworth inclined, or more than inclined, to the same opinion (*y*). Such is the authority for the doctrine of strictly liability. Very possibly more dicta to the same purpose might be collected, but I do not think anything of importance has been left out (*z*). Although far from decisive, the weight of opinion conveyed by these various utterances is certainly respectable.

Cases where exception allowed.

On the other hand we have a series of cases which appear even more strongly to imply, if not to assert, the contrary doctrine. A. and B. both set out in their vessels to look for an abandoned raft laden with goods. A. first gets hold of the raft, then B., and A.'s vessel is damaged by the wind and sea driving B.'s against it. On such facts the Court of King's Bench held in 1770 that A. could not maintain trespass, "being of opinion that the * original act of the defendants was not [* 127] unlawful" (*a*). Quite early in the century it had been

(*x*) 3 East 593 (A. D. 1803).

(*y*) L. R. 3 H. L. at p. 341.

(*z*) Sometimes the case of James *v.* Campbell (1832) 5 C. & P. 372, is cited in this connexion. But not only is it a Nisi Prius case with nothing particular to recommend it, but it is irrelevant. The facts there alleged were that A. in a quarrel with B. struck C. Nothing shows that A. would have been justified or excused in striking B. And if the blow he intended was not lawful, it was clearly no excuse that he struck the wrong man (p. 29 above, and see R. *v.* Latimer (1886) 17 Q. B. D. 359).

(*a*) Davis *v.* Sanders, 2 Chitty 639.

held that if a man's horse runs away with him, and runs over another man, he is not even *prima facie* a trespasser, so that under the old rules of pleading it was wrong to plead specially in justification (*b*). Here however it may be said there was no voluntary act at all on the defendant's part. In Wakeman *v.* Robinson, a modern running-down case (*c*), the Court conceded that "if the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie;" thinking, however, that on the facts there was proof of negligence, they refused a new trial, which was asked for on the ground of misdirection in not putting it to the jury whether the accident was the result of negligence or not. In 1842 this declaration of the general rule was accepted by the Court of Queen's Bench, though the decision again was on the form of pleading (*d*).

Holmes *v.* Mather.

Lastly, we have a decision well within our own time, which, if the judgments were not so expressed as to put it on a somewhat narrower ground, would be conclusive. In Holmes *v.* Mather (*e*), the defendant was out with a pair of horses driven by his groom. The horses ran away, and the groom, being unable to stop them, guided them as best he could; at last he failed to get them clear round a corner, and they knocked down the plaintiff. If the driver had not attempted to turn the corner, they would have run straight into a shop-front, and (it was suggested) would not have touched the [* 128] plaintiff at all. The jury * found there was no negligence. Here the driver was certainly acting, for he was trying to turn the horses. And it was argued, on the authority of the old cases and dicta, that a trespass had been committed. The Court refused to take this view, but said nothing about inevitable accident in general. "For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid" (*f*). Thus it seems to be made a question not only of the defendant being free from blame, but of the accident being such as is incident to the ordinary use

(*b*) Gibbons *v.* Pepper, 1 Lord Raym. 38.
(*c*) 1 Bing. 213 (1823). The argument for the defendant seems to have been very well reasoned.
(*d*) Hall *v.* Fearnley, 3 Q. B. 919. The line between this and Gibbons *v.* Pepper is rather fine.
(*e*) L. R. 10 Ex. 261 (1875).
(*f*) Bramwell B. at p. 267.

of public roads. The same idea is expressed in the judgment of the Exchequer Chamber in Rylands *v.* Fletcher, where it is even said that all the cases in which inevitable accident has been held an excuse can be explained on the principle "that the circumstances were such as to show that the plaintiff had taken that risk upon himself" (*g*).

Still Holmes *v.* Mather carries us a long way towards the position of the Nitro-glycerine Case and Brown *v.* Kendall. And, that position being in itself, as is submitted, the reasonable one, and nothing really authoritative standing against it, we seem justified in saying on the whole that these decisions—entitled as they are to our best consideration and respect, though not binding on English courts—do correctly express the common law, and the contrary opinion, though it has been widely accepted, is erroneous. All this inquiry may be thought to belong not so much to the head of exceptions from liability as to the fixing of the principles of liability in the first instance. But such an inquiry must in practice always present itself under the form of determining whether the particular * circum- [* 129] stances exclude liability for an act or consequence which is at first sight wrongful. The same remark applies, to some extent, to the class of cases which we take next in order. Conclusion.

9.—*Exercise of Common Rights.*

We have just left a topic not so much obscure in itself as obscured by the indirect and vacillating treatment of it in our authorities. That which we now take up is a well settled one in principle, and the difficulties have been only in fixing the limits of application. It is impossible to carry on the common affairs of life without doing various things which are more or less likely to cause loss or inconvenience to others, or even which obviously tend that way; and this in such a manner that their tendency cannot be remedied by any means short of not acting at all. Competition in business is the most obvious example. If John and Peter are booksellers in the same street, each of them must to some extent diminish the custom and profits of the Immunity in exercise of common rights.

(*g*) L. R. 1 Ex. at pp. 286, 287.

other. So if they are shipowners employing ships in the same trade, or brokers in the same market. So if, instead of John and Peter, we take the three or four railway companies whose lines offer a choice of routes from London to the north. But it is needless to pursue examples. The relation of profits to competition is matter of common knowledge. To say that a man shall not seek profit in business at the expense of others is to say that he shall not do business at all, or that the whole constitution of society shall be altered. Like reasons apply to a man's use of his own land in the common way of husbandry, or otherwise for ordinary and lawful purposes. In short, life could not go on if [* 130] we did not, as the price of our own free * action, abide some measure of inconvenience from the equal freedom of our neighbours. In these matters *veniam petimusque damusque vicissim.* Hence the rule of law that the exercise of ordinary rights for a lawful purpose and in a lawful manner is no wrong even if it causes damage. It is chiefly in this class of cases that we meet with the phrase or formula *damnum sine iniuria;* a form of words which, like many other Latin phrases and maxims, is too often thought to serve for an explanation, when in truth it is only an abridgment or *memoria technica* of the things to be explained. It is also of doubtful elegance as a technical phrase, though in general Latin literature *iniuria* no doubt had a sufficiently wide meaning (*h*). In English usage, however, it is of long standing (*i*).

(*h*) Ulpian wrote: (D. 9. 1. si quadrupes, 1, § 3): "Pauperies est damnum sine iniuria facientis datum, nec enim potest animal iniuria fecisse, quod sensu caret." This is in a very special context, and is far from warranting the use of "damnum sine iniuria" as a common formula. Being, however, adopted in the Institutes, 4, 9, pr. (with the unidiomatic variant "*iniuriam* fecisse"), it probably became, through Azo, the origin of the phrase now current. In Gaius 3. 211 (on the lex Aquilia) we read: "Iniuria autem occidere intellegitur cuius dolo aut culpa id accideret, nec ulla alia lege damnum quod sine iniuria datur reprehenditur." This shows that "damnum sine iniuria dare" was a correct if not a common phrase: though it could never have for Gaius or Ulpian the wide meaning of "harm [of any kind] which gives no cause of action." "Damnum sine iniuria" standing alone as a kind of compound noun, according to the modern use, is hardly good Latin.

(*i*) Bracton says, fo. 221 a: "Si quis in fundo proprio construat aliquod molendinum, et sectam suam et aliorum vicinorum subtrahat vicino, facit vicino damnum et non iniuriam." In 11 Hen. IV. 47, pl. 21 (see below), "damnum absque iniuria" occurs.

A classical illustration of the rule is given by a case in the Year-Book of Henry IV., which has often been cited in modern books, and which is still perfectly good authority (*k*). The action was trespass by two masters of the * Grammar School of Gloucester [* 131] against one who had set up a school in the same town, whereby the plaintiffs, having been wont to take forty pence a quarter for a child's schooling, now got only twelve pence. It was held that such an action could not be maintained. "*Damnum*" said Hankford J. "may be *absque injuria*, as, if I have a mill, and my neighbour build another mill, whereby the profit of my mill is diminished, I shall have no action against him though it is damage to me . . . . but if a miller disturbs the water from flowing to my mill, or doth any nuisance of the like sort, I shall have such action as the law gives." If the plaintiffs here had shown a franchise in themselves, such as that claimed by the Universities, it might have been otherwise. The case of Gloucester Grammar School.

A case very like that of the mills suggested by Hankford actually came before the Court of Common Pleas a generation later (*l*), and Newton C. J. stated the law in much the same terms. Even if the owner of the ancient mill is entitled to sue those who of right ought to grind at his mill, and grind at the new one, he has not any remedy against the owner of the new mill. " He who hath a freehold in the vill may build a mill on his own ground, and this is wrong to no man." And the rule has ever since been treated as beyond question. Competition is in itself no ground of action, whatever damage it may cause. A trader can complain of his rival only if a definite exclusive right, such as a patent right, or the right to a trade mark, * is in- [* 132] fringed, or if there is a wilful attempt to damage his business by injurious falsehood (" slander of title ") or acts otherwise unlawful in themselves. Case of mills.

Another group of authorities of the same class is that which establishes " that the disturbance or removal Digging wells, &c. in

(*k*) Hil. 11 Hen. IV. 47, pl. 21 (A.D. 1410–11). In the course of argument the opinion is thrown out that the education of children is a spiritual matter, and therefore the right of appointing a school-master cannot be tried by a temporal court. The plaintiff tried to set up a *quasi* franchise as holding an ancient office in the gift of the Prior of Lantone, near Gloucester (*sic:* probably Llanthony is meant).

(*l*) 22 Hen. VI. 14, pl. 23 (A. D. 1443). The school case is cited.

a man's own land.

of the soil in a man's own land, though it is the means (by process of natural percolation) of drying up his neighbour's spring or well, does not constitute the invasion of a legal right, and will not sustain an action. And further, that it makes no difference whether the damage arise by the water percolating away, so that it ceases to flow along channels through which it previously found its way to the spring or well; or whether, having found its way to the spring or well, it ceases to be retained there" (*m*). The leading cases are Acton *v.* Blundell (*n*), and Chasemore *v.* Richards (*o*). In the former it was expressly laid down as the governing principle "that the person who owns the surface may dig therein, and apply all that is there found to his own purposes, at his free will and pleasure, and that if in the exercise of such right he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque iniuria* which cannot become the ground of an action." In this case the defendant had sunk a deep pit on his own land for mining purposes, and kept it dry by pumping in the usual way, with the result of drying up a well which belonged to the palintiff, and was used by him to supply his cotton mill. Chasemore *v.* Richards carried the rule a step further in two directions. It [* 133] settled that it makes no difference if the * well or watercourse whose supply is cut off or diminished is ancient, and also (notwithstanding considerable doubt expressed by Lord Wensleydale) that it matters not whether the operations carried on by the owner of the surface are or are not for any purpose connected with the use of the land itself. The defendants in the cause were virtually the Local Board of Health of Croydon, who had sunk a deep well on their own land to obtain a water supply for the town. The making of this well, and the pumping of great quantities of water from it for the use of the town, intercepted water that had formerly found its way into the river Wandle by underground channels, and the supply of water to the plaintiff's ancient mill, situated on that river, was diminished. Here the defendants, though using their land in an ordinary way, were not using it for an ordinary purpose. But the House of Lords refused to make any

Chasemore *v.* Richards.

(*m*) Per Cur., Ballacorkish Mining Co. *v.* Harrison (1873) L. R. 5 P. C. at p. 61.

(*n*) 12 M. & W. 324; 13 L. J. Ex. 289 (1843).

(*o*) 7 H. L. C. 349; 29 L. J. Ex. 81 (1859.)

distinction on that score, and held the doctrine of Acton *v.* Blundell applicable (*p*). The right claimed by the plaintiff was declared to be too large and indefinite to have any foundation in law. No reasonable limits could be set to its exercise, and it could not be reconciled with the natural and ordinary rights of landowners. These decisions have been generally followed in the United States (*q*).

Other applications of same principle.

There are many other ways in which a man may use his own property to the prejudice of his neighbour, and yet no action lies. I have no remedy against a neighbour who opens a new window so as to overlook my garden: on the other hand, he has none against me if, at any time before he has gained a prescriptive right to the light, I build *a wall or put up a screen [* 134] so as to shut out his view from that window. But the principle in question is not confined to the use of property. It extends to every exercise of lawful discretion in a man's own affairs. A tradesman may depend in great measure on one large customer. This person, for some cause of dissatisfaction, good or bad, or without any assignable cause at all, suddenly withdraws his custom. His conduct may be unreasonable and ill-conditioned, and the manifest cause of great loss to the tradesman. Yet no legal wrong is done. And such matters could not be otherwise ordered. It is more tolerable that some tradesmen should suffer from the caprice of customers than that the law should dictate to customers what reasons are or are not sufficient for ceasing to deal with a tradesman.

Rogers *v.* Rajendro Dutt.

But there are cases of this class which are not so obvious. A curious one arose at Calcutta at the time of the Indian Mutiny, and was taken up to the Privy Council. Rajendro Dutt and others, the plaintiffs below, were the owners of the *Underwriter*, a tug employed in the navigation of the Hoogly. A troopship with English troops arrived at the time when they were most urgently needed. For towing up this ship the captain of the tug asked an extraordinary price. Failing to agree with him, and thinking his demand extortionate, Captain Rogers, the Superintendent of Marine (who

(*p*) Cp., as to the distinction between the "natural user" of land and the maintenance of artificial works, Hurdman *v.* N. E. R. Co. (1878) 3 C. P. Div. at p. 174; and further as to the limits of "natural user," Ballard *v.* Tomlinson (1885) 29 Ch. Div. 115.

(*q*) Cooley on Torts, 580.

was defendant in the suit), issued a general order to officers of the Government pilot service that the *Underwriter* was not to be allowed to take in tow any vessel in their charge. Thus the owners not only failed to make a profit of the necessities of the Government of India, but lost the ordinary gains of their business so far as they were derived from towing ships in the charge of Government pilots. The Supreme Court of [* 135] Calcutta held that * these facts gave a cause of action against Captain Rogers, but the Judicial Committee reversed the decision on appeal (*r*). The plaintiffs had not been prejudiced in any definite legal right. No one was bound to employ their tug, any more than they were bound to take a fixed sum for its services. If the Government of India, rightly or wrongly, thought the terms unreasonable, they might decline to deal with the plaintiffs both on the present and on other occasions, and restrain public servants from dealing with them.

" The Government certainly, as any other master, may lawfully restrict its own servants as to those whom they shall employ under them, or co-operate with in performing the services for the due performance of which they are taken into its service. Supposing it had been believed that the *Underwriter* was an ill-found vessel, or in any way unfit for the service, might not the pilots have been lawfully forbidden to employ her until these objections were removed? Would it not indeed have been the duty of the Government to do so? And is it not equally lawful and right when it is honestly believed that her owners will only render their services on exorbitant terms?" (*s*).

It must be taken that the Court thought the order complained of did not, as a matter of fact, amount to an obstruction of the tug-owners' common right of offering their vessel to the non-official public for employment. Conduct might easily be imagined, on the part of an officer in the defendant's position, which would amount to this. And if it did, it would probably be a cause of action (*t*).

Whether malice material in these cases.

In this last case the harm suffered by the plaintiff in [* 136] * the court below was not only the natural, but apparently the intended consequence of the act com-

(*r*) Rogers *v.* Rajendro Dutt, 8 Moo. I. A. 103.
(*s*) 8 Moo. I. A. at p. 134.
(*t*) See per Holt C. J. in Keeble *v.* Hickeringill, 11 East at pp. 575, 576.

plained of. The defendant however acted from no reason of private hostility, but in the interest (real or supposed) of the public service. Whether the averment and proof of malice, in other words that the act complained of was done with the sole or chief intention of causing harm to the plaintiff as a private enemy (*u*), would make any difference in cases of this class, does not appear to be decided by any authority in our law. In Rogers *v.* Rajendro Dutt the Judicial Committee expressly declined to say what the decision would be if this element were present. In Chasemore *v.* Richards the statement of facts (by an arbitrator) on which the case proceeded expressly negatived any intention to harm the plaintiff. Lord Wensleydale thought (apparently with reluctance) that the principle of regarding the presence or absence of such an intention had found no place in our law (*x*); and partly for that reason he would have liked to draw the line of unquestionable freedom of use at purposes connected with the improvement of the land itself; but he gave no authority for his statement. At the same time it must be allowed that he expressed the general sense of English lawyers. (*y*).

Roman doctrine of "animus vicino nocendi."

The Roman lawyers on the other hand allowed that "animus vicino nocendi" did or might make a difference. In a passage cited and to some extent relied on (in the scantiness, at that time, of native authority) in Acton *v.* Blundell, we read: "Denique Marcellus scribit, cum eo qui in suo fodiens vicini fontem avertit, nihil posse agi, *nec de dolo actionem: [* 137] et sane non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit" (*z*). And this view is followed by recognized authorities in the law of Scotland, who say that an owner using his own land must act "not in mere spite or malice, *in aemulationem vicini*" (*a*). There seems on principle to be much to recommend it. Certainly it would be no answer to say, as one is inclined to do at first sight, that the law can regard only intentions and not motives. For in some cases the law does already regard motive

(*u*) It is very difficult to say what "malice," as a term of art, really means in any one of its generally similar but not identical uses; but I think the gloss here given is sufficiently correct for the matter in hand.

(*x*) 7 H. L. C. at p. 388.

(*y*) See Dr. Markby's "Elements of Law," s. 239.

(*z*) D. 39, 3, de aqua, 1, § 12 (Ulpian).

(*a*) Bell's Principles, 966 (referred to by Lord Wensleydale).

as distinct from purpose or intention, as in actions for malicious prosecution, and in the question of privileged communications in actions for libel. And also this is really a matter of intention. The motives for a man wishing ill to his neighbour in the supposed case may be infinite: the purpose, the contemplated and desired result, is to do such and such ill to him, to dry up his well, or what else it may be. If our law is to be taken as Lord Wensleydale assumed it to be, its policy must be rested simply on a balance of expediency. *Animus vicini nocendi* would be very difficult of proof, at all events if proof that mischief was the only purpose were required (and it would hardly do to take less): and the evil of letting a certain kind of churlish and unneighbourly conduct, and even deliberate mischief, go without redress (there being no reason to suppose the kind a common one,) may well be thought less on the whole than that of encouraging vexatious claims. In Roman law there is nothing to show whether, and how far, the doctrine of Ulpian and Marcellus was found capable of practical application. I cannot learn that it has much effect in the law of [* 138] * Scotland. It seems proper, however, to point out that there is really no positive English authority on the matter.

Cases of similar names.

Again our law does not in general recognize any exclusive right to the use of a name, personal or local. I may use a name similar to that which my neighbour uses—and that whether I inherited or found it, or have assumed it of my own motion—so long as I do not use it to pass off my wares or business as being his. The fact that inconvenience arises from the similarity will not of itself constitute a legal injury (*b*), and allegations of pecuniary damage will not add any legal effect. "You must have in our law injury as well as damage" (*c*).

10.—*Leave and Licence.*

Consent or acceptance

Harm suffered by consent is within limits to be mentioned, not a cause of civil action. The same is true

(*b*) See Burgess *v.* Burgess (1853) 3 D. M. G. 896, a classical case; Du Boulay *v.* Du Boulay (1869) L. R. 2 P. C. 430; Day *v.* Brownrigg (1878) 10 Ch. Div. 294; Street *v.* Union Bank, &c. (1885) 30 Ch. D. 156.

(*c*) Jessel M. R. 10 Ch. Div. 304.

where it is met with under conditions manifesting acceptance, on the part of the person suffering it, of the risk of that kind of harm. The maxim by which the rule is commonly brought to mind is "Volenti non fit iniuria." "Leave and licence" is the current English phrase for the defence raised in this class of cases. On the one hand, however, *volenti non fit iniuria* is not universally true. On the other hand, neither the Latin nor the English formula provides in terms for the state of things in which there is not specific will or assent to suffer something which, if inflicted against the party's will, would be a wrong, but only * conduct [* 139] showing that, for one reason or another, he is content to abide the chance of it (*d*). of risk (leave and licence).

The case of express consent is comparatively rare in our books, except in the form of a licence to enter upon land. It is indeed in this last connexion that we most often hear of "leave and licence," and the authorities mostly turn on questions of the kind and extent of permission to be inferred from particular language or acts (*e*). Express licence.

Force to the person is rendered lawful by consent in such matters as surgical operations. The fact is common enough; indeed authorities are silent or nearly so, because it is common and obvious. Taking out a man's tooth without his consent would be an aggravated assault and battery. With consent it is lawfully done every day. In the case of a person under the age of discretion, the consent of that person's parent or guardian is generally necessary and sufficient (*f*). But consent alone is not enough to justify what is on the face of it bodily harm. There must be some kind of just cause, as the cure or extirpation of disease in the case of surgery. Wilful hurt is not excused by consent or assent if it has no reasonable object. Thus if a man licenses another to beat him, not only does this not prevent the assault from being a punishable offence, but the better opinion is that it does not deprive the party beaten of his right of action. On this principle prize-fights and the like "are unlawful even when entered Limits of consent.

(*d*) Unless we said that *leave* points to specific consent to an act, *licence* to general assent to the consequences of acts consented to: but such a distinction seems too fanciful.

(*e*) See Addison on Torts, p. 352, 5th ed.; Cooley on Torts (Chicago, 1880), 303, *sqq.*

(*f*) Cp. Stephen, Digest of the Criminal Law, art. 204.

[* 140] into by agreement and without anger or * mutual ill-will" (*g*). "Whenever two persons go out to strike each other, and do so, each is guilty of an assault" (*h*). The reason is said to be that such acts are against the peace, or tend to breaches of the peace. But inasmuch as even the slightest direct application of force, if not justified, was in the language of pleading *vi et armis* and *contra pacem*, something more than usual must be meant by this expression. The distinction seems to be that agreement will not justify the wilful causing or endeavouring to cause appreciable bodily harm for the mere pleasure of the parties or others. Boxing with properly padded gloves is lawful, because in the usual course of things harmless. Fighting with the bare fist is not. Football is a lawful pastime, though, many kicks are given and taken in it; a kicking match is not. Single-stick or playing with blunt sabres in the accustomed manner is lawful, because the players mean no hurt to one another, and take such order by the use of masks and pads that no hurt worth speaking of is likely. A duel with sharp swords after the manner of German students is not lawful, though there be no personal enmity between the men, and though the conditions be such as to exclude danger to life or limb. It seems to be what is called a question of mixed law and fact whether a particular action or contest involves such intention to do real hurt that consent or assent [* 141] will not justify it (*i*). Neglect of usual * precautions in any pastime known to involve danger would be evidence of wrongful intention, but not conclusive evidence.

Reg. *v.* Coney.

This question was incidentally considered by several of the judges in the recent case of Reg. *v.* Coney (*k*), where the majority of the Court held that mere volun-

(*g*) Commonwealth *v.* Collberg (1876) 119 Mass. 350, and 20 Am. Rep. 328, where authorities are collected. See also Reg. *v.* Coney (1882) 8 Q. B. D. 534, 538, 546, 549, 567, and *infra*.

(*h*) Coleridge J. in Reg. *v.* Lewis (1844) 1 C. & K. at p. 421, cp. Buller N. P. 16. The passage there and elsewhere cited from Comberbach, apart from the slender authority of that reporter, is only a dictum. Buller's own authority is really better.

(*i*) Cp. Pulton, De Pace Regis, 17 b. It might be a nice point whether the old English back-swording (see "Tom Brown") was lawful or not. And *quaere* of the old rules of Rugby football, which allowed deliberate kicking in some circumstances. *Quaere*, also, whether one monk might have lawfully licensed another to beat him by way of spiritual discipline. But anyhow he could not have sued, being civilly dead by his entering into religion.

(*k*) 8 Q. B. D. 534 (1882).

tary presence at an unlawful fight is not necessarily punishable as taking part in an assault, but there was no difference of opinion as to a prize-fight being unlawful, or all persons actually aiding and abetting therein being guilty of assault, notwithstanding that the principals fight by mutual consent. The Court had not, of course, to decide anything as to civil liability, but some passages in the judgments are material. Cave J. said: "The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely nor intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct a blow struck in a prize-fight is clearly an assault; but playing with singlesticks or wrestling do not involve an assault, nor does boxing with gloves in the ordinary way" (*l*). Stephen J. said: "When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is * inflicted under such circum- [* 142] stances, that its infliction is injurious to the public as well as to the person injured. . . . . In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used, as for instance in cases of wrestling, singlestick, sparring with gloves, football, and the like; but in all cases the question whether consent does or does not take from the application of force to another its illegal character is a question of degree depending upon circumstances" (*m*). These opinions seem equally applicable to the rule of civil responsibility (*n*).

A licence obtained by fraud is of no effect. This is too obvious on the general principles of the law to need dwelling upon (*o*).

Licence gotten by fraud.

(*l*) 8 Q. B. D. at p. 539. As to the limits of lawful boxing, see Reg *v.* Orton (1878) 39 L. T. 293.

(*m*) 8 Q. B. D. at p. 540. Compare arts. 206, 208 of the learned judge's "Digest of the Criminal Law." The language of art. 208 follows the authorities, but I am not sure that it exactly hits the distinction.

(*n*) Notwithstanding the doubt expressed by Hawkins J., 8 Q. B. D. at pp. 553, 554.

(*o*) A rather curious illustration may be found in Davies *v.* Marshall (1861) 10 C. B. N. S. 697; 31 L. J. C. P. 61; where the

Extended meaning of *volenti non fit iniuria.*

Trials of strength and skill in such pastimes as those above mentioned afford, when carried on within lawful bounds, the best illustration of the principle by which the maxim *volenti non fit iniuria* is enlarged beyond its literal meaning. A man cannot complain of harm (within the limits we have mentioned) to the chances of which he has exposed himself with knowledge and of his free will. Thus in the case of two men fencing or playing at singlestick, *volenti non fit iniuria* would [* 143] be assigned by * most lawyers as the governing rule, yet the words must be forced. It is not the will of one player that the other should hit him; his object is to be hit as seldom as possible. But he is content that the other shall hit him as much as by fair play he can; and in that sense the striking is not against his will. Therefore the "assault" of the school of arms is no assault in law. Still less is there an actual consent if the fact is an accident, not a necessary incident, of what is being done; as where in the course of a cricket match a player or spectator is struck by the ball. I suppose it has never occurred to any one that legal wrong is done by such an accident even to a spectator who is taking no part in the game. So if two men are fencing, and one of the foils breaks, and the broken end, being thrown off with some force, hits a bystander, no wrong is done to him, Such too is the case put in the Indian Penal Code (*p*) of a man who stands near another cutting wood with a hatchet, and is struck by the head flying off. It may be said that these examples are trivial. They are so, and for that reason appropriate. They show that the principle is constantly at work, and that we find little about it in our books just because it is unquestioned in common sense as well as in law.

Relation of these cases to inevitable accident.

Many cases of this kind seem to fall as naturally under the exception of inevitable accident, if that exception is allowed to the extent contended for above. But there is, we conceive, this distinction, that where the plaintiff has voluntarily put himself in the way of risk the defendant is not bound to disprove negligence. If I choose to stand near a man using an axe, he may be a good woodman or not; but I cannot (it is submitted) complain of an accident because a more skilled wood-

---

so-called equitable plea and replication seem to have amounted to a common law plea of leave and licence and joinder of issue, or perhaps new assignement, thereon.

(*p*) Illust. to s. 80. On the point of actual consent, cf. ss. 87 and 88.

man might have avoided it. * A man dealing [* 144] with explosives is bound, as regards his neighbour's property, to diligence and more than diligence. But if I go and watch a firework-maker for my own amusement, and the shop is blown up, it seems I shall have no cause of action, even if he was handling his materials unskillfully. This, or even more, is implied in the decision in Ilott *v.* Wilkes (*q*), where it was held that one who trespassed in a wood, having notice that spring guns were set there, and was shot by a spring-gun, could not recover. The maxim "volenti non fit iniuria" was expressly held applicable: "he voluntarily exposes himself to the mischief which has happened" (*r*). The case gave rise to much public excitement, and led to an alteration of the law (*s*), but it has not been doubted in subsequent authorities that on the law as it stood, and the facts as they came before the Court, it was well decided. As the point of negligence was expressly raised by the pleadings, the decision is an authority that if a man goes out of his way to a dangerous action or state of things, he must take the risk as he finds it. And this appears to be material with regard to the attempt made by respectable authorities, and noticed above, to bring under this principle the head of excuse by reason of inevitable accident (*t*).

Suppose it w unlawful to set spring g

* We now see that the whole law of negli- [* 145] gence assumes this principle not to be applicable. It was suggested in Holmes *v.* Mather (*u*) that when a competent driver is run away with by his horses, and in spite of all he can do they run over a foot-passenger, the foot-passenger is disabled from suing, not simply because the driver has done no wrong, but because people who walk along a road must take the ordinary risks

Distinction from cases where negligence is ground of action.

(*q*) 3 B. & Ald. 304 (1820); cp. and dist. the later case of Bird *v.* Holbrook, 4 Bing. 628. The argument that since the defendant could not have justified shooting a trespasser with his own hand, even after warning, he could not justify shooting him with a spring-gun, is weighed and found wanting, though perhaps it ought to have prevailed.

(*r*) Per Bayley J. 3 B. & A. at p. 311, and Holroyd J. at p. 314.

(*s*) Edin. Rev. xxxv. 123, 410 (reprinted in Sydney Smith's works). Setting spring-guns, except by night in a dwelling-house for the protection thereof, was made a criminal offence by 7 & 8 Geo. 4, c. 18, now repealed and substantially re-enacted (24 & 25 Vict. c. 95, s. 1, and c. 100, s. 31).

(*t*) Holmes *v.* Mather (1875) L. R. 10 Ex. at p. 267; Rylands *v.* Fletcher (1866) L. R. 1 Ex. at p. 287.

(*u*) L. R. 19 Ex. at p. 267.

of traffic. But if this were so, why stop at misadventure without negligence? It is common knowledge that not all drivers are careful. It is known, or capable of being known, that a certain percentage are not careful. The actual risk to which a man crossing the street is exposed (apart from any carelessness on his own part) is that of pure misadventure, and also that of careless driving, the latter element being probably the greater. If he really took the whole risk, a driver would not be liable to him for running over him by negligence: which is absurd. Are we to say, then, that he takes on himself the one part of the risk and does not take the other? A reason thus artificially limited is no reason at all, but a mere fiction. It is simpler and better to say plainly that the driver's duty is to use proper and reasonable care, and beyond that he is not answerable. The true view, we submit, is that the doctrine of voluntary exposure to risk has no application as between parties on an equal footing of right, of whom one does not go out of his way more than the other. Much the same principle has in late years been applied, and its limits discussed, in the special branch of the law which deals with contributory negligence. This we shall have to consider in its place (*v*).

[*146] * 11.—*Works of necessity.*

Works of necessity.

A class of exceptions as to which there is not much authority, but which certainly exists in every system of law, is that of acts done of necessity to avoid a greater harm, and on that ground justified. Pulling down houses to stop a fire (*x*), and casting goods overboard, or otherwise sacrificing property, to save a ship or the lives of those on board, are the regular examples. The maritime law of general average assumes, as its very foundation, that the destruction of property under such conditions of danger is justifiable (*y*). It is said also that "in time of war one shall justify entry on another's land to make a bulwark in defence of the king and the

(*v*) See Gee *v.* Metropolitan R. Co. (1873) Ex. Ch. L. R. 8 Q. B. 161; Robson *v.* N. E. R. Co. (1875) L. R. 10 Q. B. at p. 274; and per Bramwell L. J. (not referring to these authorities, and taking a somewhat different view), Lax *v.* Corporation of Darlington (1879) 5 Ex. D. at p. 35.

(*x*) Dyer, 36 *b*.

(*y*) Mouse's case, 12 Co. Rep. 63, is only just worth citing as an illustration that no action lies.

kingdom." In these cases the apparent wrong "sounds for the public good" (*z*). There are also circumstances in which a man's property or person may have to be dealt with promptly for his own obvious good, but his consent, or the consent of any one having lawful authority over him, cannot be obtained in time. Here it is evidently justifiable to do what needs to be done, in a proper and reasonable manner of course. It has never been supposed to be even technically a trespass if I throw water on my neighbor's goods to save them from fire, or seeing his house on fire, enter on his land to help in putting it out (*a*). Nor is it an assault for the first * passer-by to pick up a man rendered insen- [* 147] sible by an accident, or for a competent surgeon, if he perceives that an operation ought forthwith to be performed to save the man's life, to perform it without waiting for him to recover consciousness and give his consent. These works of charity and necessity must be lawful as well as right. Our books have only slight and scattered hints on the subject, probably because no question has ever been made (*b*).

12.—*Private defence.*

Self-defence (or rather private defence (*c*), for defence of one's self is not the only case) is another ground of immunity well known to the law. To repel force by force is the common instinct of every creature that has means of defence. And when the original force is unlawful, this natural right or power of man is allowed, nay approved, by the law. Sudden and strong resistance to unrighteous attack is not merely a thing to be tolerated; in many cases it is a moral duty. Therefore Self-defence.

(*z*) Kingsmill J. 21 Hen. VII. 27, pl. 5; cp. Dyer, *ubi supra*. In 8 Ed. IV. 23, pl. 41, it is thought doubtful whether the justification should be by common law or by special custom.

(*a*) Goodwill without real necessity would not do; there must be danger of total loss, and, it is said, without remedy for the owner against any person, per Rede C. J. 21 Hen. VII. 28, pl. 5; but if this be law, it must be limited to remedies against a trespasser, for it cannot be a trespass or a lawful act to save a man's goods according as they are or are not insured. Cp. Y. B. 12 Hen. VIII. 2, where there is some curious discussion on the theory of trespass generally.

(*b*) Cf. the Indian Penal Code, s. 92, and the powers given to the London Fire Brigade by 28 & 29 Viet. c. 90, s. 12, which seem rather to assume a pre-existing right at common law.

(*c*) This is the term adopted in the Indian Penal Code.

it would be a grave mistake to regard self-defence as a necessary evil suffered by the law because of the hardness of men's hearts. The right is a just and perfect one. It extends not only to the defence of a man's own person, but to the defence of his property or possession. And what may be lawfully done for oneself in this regard may likewise be done for a wife or husband, a [* 148] parent or child, a master or * servant (*d*). At the same time no right is to be abused or made the cloak of wrong, and this right is one easily abused. The law sets bounds to it by the rule that the force employed must not be out of proportion to the apparent urgency of the occasion. We say apparent, for a man cannot be held to form a precise judgment under such conditions. The person acting on the defensive is entitled to use as much force as he reasonably believes to be necessary. Thus it is not justifiable to use a deadly weapon to repel a push or a blow with the hand. It is even said that a man attacked with a deadly weapon must retreat as far as he safely can before he is justified in defending himself by like means. But this probably applies (so far as it is the law) only to criminal liability (*e*). On the other hand if a man presents a pistol at my head and threatens to shoot me, peradventure the pistol is not loaded or is not in working order, but I shall do no wrong before the law by acting on the supposition that it is really loaded and capable of shooting.

Killing of animals in defence of property.

Cases have arisen on the killing of animals in defence of one's property. Here, as elsewhere, the test is whether the party's act was such as he might reasonably, in the circumstances, think necessary for the prevention of harm which he was not bound to suffer. Not very long ago the subject was elaborately discussed in New Hampshire, and all or nearly all the authorities, [* 149] English and American, * reviewed (*f*). Some

(*d*) Blackstone iii. 3; and see the opinion of all the Justices of K. B., 21 Hen. VII. 39, pl. 50. There has been some doubt whether a master could justify on the ground of the defence of his servant. But the practice and the better opinion have always been otherwise. Before the Conquest it was understood that a lord might fight in defence of his men as well as they in his. Ll. Alf. c. 42, § 5.

(*e*) See Stephen, Digest of Criminal Law, art. 200. Most of the authority on this subject is in the early treatises on Pleas of the Crown.

(*f*) Aldrich *v.* Wright (1873) 53 N. H. 398; 16 Am. Rep. 339. The decision was that the penalty of a statute ordaining a close time for minks did not apply to a man who shot on his own land,

of these, such as Deane *v.* Clayton (*g*), turn less on what amount of force is reasonable in itself than on the question whether a man is bound, as against the owners of animals which come on his land otherwise than as of right, to abstain from making the land dangerous for them to come on. And in this point of view it is immaterial whether a man keeps up a certain state of things on his own land for the purpose of defending his property or for any other purpose which is not actually unlawful.

As to injuries received by an innocent third person from an act done in self-defence, they must be dealt with on the same principle as accidental harm proceeding from any other act lawful in itself. It has to be considered, however, that a man repelling imminent danger cannot be expected to use as much care as he would if he had time to act deliberately.

Injury to third persons from acts of self-defence.

Some of the dicta in the well-known case of Scott *v.* Shepherd (*h*) go the length of suggesting that a man acting on the spur of the moment under "compulsive necessity" (the expression of De Grey C. J.) is excusable as not being a voluntary agent, and is therefore not bound to take any care at all. But this appears very doubtful. In that case it is hard to believe that Willis or Ryal, if he had been * worth suing [* 150] and had been sued, could have successfully made such a defence. They "had a right to protect themselves by removing the squib, but should have taken care"—at any rate such care as was practicable under the circumstances—"to do it in such a manner as not to endamage others" (*i*). The Roman lawyers held that a man who throws a stone in self-defence is not excused if the stone by misadventure strikes a person other than the assailant (*k*). Perhaps this is a harsh opinion, but it seems better, if the choice must be made, than holding that one may with impunity throw a lighted squib across a market-house full of people in order to save a

---

in the close season, minks which he reasonably thought were in pursuit of his geese. Compare Taylor *app.* Newman *resp.* (1863) 4 B. & S. 89.

(*g*) 7 Taunt. 489, the case of dog-spears, where the Court was equally divided (1817); Jordin *v.* Crump (1841) 8 M. & W. 782, where the Court took the view of Gibb C. J. in the last case, on the ground that setting dog-spears was not in itself illegal. Notice, however, was pleaded.

(*h*) 2 W. Bl. 892.

(*i*) Blackstone J. in his dissenting judgment.

(*k*) D. 9. 2, ad l. Aquil. 45, § 4; *supra*, p. 118.

stall of gingerbread. At all events a man cannot justify doing for the protection of his own property a deliberate act whose evident tendency is to cause, and which does cause, damage to the property of an innocent neighbour. Thus if flood water has come on my land by no fault of my own, this does not entitle me to let it off by means which in the natural order of things cause it to flood an adjoining owner's land (*l*).

13.—*Plaintiff a wrong-doer.*

Harm suffered by a wrongdoer: doubtful whether any special disability.

Language is to be met with in some books to the effect that a man cannot sue for any injury suffered by him at a time when he is himself a wrong-doer. But there is no such general rule of law. If there were, one consequence would be that an occupier of land (or even a fellow-trespasser) might beat or wound a tres- [* 151] passer without being * liable to an action, whereas the right of using force to repel trespass to land is strictly limited; or if a man is riding or driving at an incautiously fast pace, anybody might throw stones at him with impunity. In Bird *v.* Holbrook (*m*) a trespasser who was wounded by a spring-gun (after the passing of the Act which made the setting of spring-guns unlawful) was held entitled to maintain his action. And generally, "a trespasser is liable to an action for the injury which he does; but he does not forfeit his right of action for an injury sustained" (*n*). It does not appear on the whole that a plaintiff is disabled from recovering by reason of being himself a wrong-doer, unless some unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction: and even then it is difficult to find a case where it is necessary to assume any special rule of this kind. It would be no answer to an action for killing a dog to show that the owner was liable to a penalty for not having taken out a dog licence in due time. If, again, A. receives a letter containing defamatory statements concerning B., and reads the letter aloud in the presence of several persons, he may be doing

(*l*) Whalley *v.* Lanc. and Yorkshire R. Co. (1884) 13 Q. B. Div. 131, distinguishing the case of acts lawful in themselves which are done by way of precaution against an impending common danger.

(*m*) 6 Bing. 628. Cp. p. 144 above.

(*n*) Barnes *v.* Ward (1850) 9 C. B. 392; 19 L. J. C. P. 195.

wrong to B. But this will not justify or excuse B. if he seizes and tears up the letter. A. is unlawfully possessed of explosives which he is carrying in his pocket. B., walking or running in a hurried and careless manner, jostles A. and so causes an explosion. Certainly A. cannot recover against B. for any hurt he takes by this, or can at most recover nominal damages, as if he had received a harmless push. But would it make any difference if A.'s possession were lawful? Suppose there were no statutory regulation at all: still a man going about with sensitive explosives in * his [* 152] pocket would be exposing himself to an unusual risk obvious to him and not obvious to other people, and on the principles already discussed would have no cause of action. And on the other hand it seems a strong thing to say that if another person does know of the special danger, he does not become bound to take answerable care, even as regards one who has brought himself into a position of danger by a wrongful act. Cases of this kind have sometimes been thought to belong to the head of contributory negligence. But this, it is submitted, is an unwarrantable extension of the term, founded on a misapprehension of the true meaning and reasons of the doctrine; as if contributory negligence were a sort of positive wrong for which a man is to be punished. This, however, we shall have to consider hereafter. On the whole it may be doubted whether a mere civil wrong-doing, such as trespass to land, ever has in itself the effect now under consideration. Almost every case that can be put seems to fall just as well, if not better, under the principle that a plaintiff who has voluntarily exposed himself to a known risk cannot recover, or the still broader rule that a defendant is liable only for those consequences of his acts which are, in the sense explained in a former chapter (*o*), natural and probable.

Conflict of opinion in United States in cases of Sunday travelling.

In America there has been a great question, upon which there have been many contradictory decisions, whether the violation of statutes against Sunday travelling is in itself a bar to actions for injuries received in the course of such travelling through defective condition of roads, negligence of railway companies, and the like. In Massachusetts it has been held that a plaintiff in such circumstances cannot recover, although the accident might just as well have * happened on [* 153]

(*o*) P. 32 above.

a journey lawful for all purposes. These decisions must be supported, if at all, by a strict view of the policy of the local statutes for securing the observance of Sunday. They are not generally considered good law, and have been expressly dissented from in some other States (*p*).

Cause of action connected with unlawful agreement.

It is a rule not confined to actions on contracts that "the plaintiff cannot recover where in order to maintain his supposed claim he must set up an illegal agreement to which he himself has been a party" (*q*): but its application to actions of tort is not frequent or normal. The case from which the foregoing statement is cited is the only clear example known to the writer, and its facts were very peculiar.

(*p*) Sutton *v.* Town of Wauwatosa (Wisconsin, 1871) Bigelow L. C. 711, and notes thereto, pp. 721–2; Cooley on Torts, 156.
(*q*) Maule J., Fivaz *v.* Nicholls (1846) 2 C. B. 501, 512.

* CHAPTER V. [* 154]

OF REMEDIES FOR TORTS.

Diversity of remedies.

At common law there were only two kinds of redress for an actionable wrong. One was in those cases—exceptional cases according to modern law and practice—where it was and is lawful for the aggrieved party, as the common phrase goes, to take the law into his own hands. The other way was an action for damages (*a*). Not that a suitor might not obtain, in a proper case, other and more effectual redress than money compensation; but he could not have it from a court of common law. Specific orders and prohibitions in the form of injunctions or otherwise were (with few exceptions, if any) (*b*) in the hand of the Chancellor alone, and the principles according to which they were granted or withheld were counted among the mysteries of Equity. But no such distinctions exist under the system of the Judicature Acts, and every branch of the Court has power to administer every remedy. Therefore we have at this day, in considering one and the same * jurisdiction, to bear in mind the manifold [* 155 forms of legal redress which for our predecessors were separate and unconnected incidents in the procedure of different courts.

Self-help.

Remedies available to a party by his own act alone may be included, after the example of the long established German usage, in the expressive name of *self-help*. The right of private defence appears at first sight to be an obvious example of this. But it is not

(*a*) Possession could be recovered, of course, in an action of ejectment. But this was an action of trespass in form only. In substance it took the place of the old real actions, and it is sometimes called a real action. Detinue was not only not a substantial exception, but hardly even a formal one, for the action was not really in tort.

(*b*) I do not think any of the powers of the superior courts of common law to issue specific commands (*e.g.* mandamus) were applicable to the redress of purely private wrongs, though they might be available for a private person wronged by a breach of public duty. Under the Common Law Procedure Acts the superior courts of common law had limited powers of granting injunctions and administering equitable relief. These were found of little importance in practice, and there is now no reason for dwelling on them.

so, for there is no question of remedy in such a case. We are allowed to repel force by force "not for the redress of injuries, but for their prevention" (*c*); not in order to undo a wrong done or to get compensation for it, but to cut wrong short before it is done; and the right goes only to the extent necessary for this purpose. Hence there is no more to be said of self-defence, in the strict sense, in this connexion. It is only when the party's lawful act restores to him something which he ought to have, or puts an end to a state of things whereby he is wronged, or at least puts pressure on the wrong-doer to do him right, that self-help is a true remedy. And then it is not necessarily a complete or exclusive remedy. The acts of this nature which we meet with in the law of torts are expulsion of a trespasser, retaking of goods by the rightful possessor, distress of cattle damage feasant, and abatement of nuisances. Peaceable re-entry upon land where there has been a wrongful change of possession might be added to the list; but it hardly occurs in modern experience. Analogous to the right of retaking goods is the right of appropriating or retaining debts under certain conditions; and various forms of lien are more or less analogous to distress. These, however, belong to the domain of contract, and we are not now concerned with [* 156] them. Such * are the species of remedial self-help recognized in the law of England. In every case alike the right of the party is subject to the rule that no greater force must be used, or damage done to property, than is necessary for the purpose in hand. In some cases the mode of exercising the right has been specially modified or regulated. Details will best be considered hereafter in relation to the special kinds of wrong to which these kinds of redress are applicable (*d*).

Judicial remedies: damages.

We pass, then, from extra-judicial to judicial redress, from remedies by the act of the party to remedies by the act of the law. The most frequent and familiar of these is the awarding of damages (*e*). Whenever an actionable wrong has been done, the party wronged is entitled to recover damages; though, as we shall immediately see, this right is not necessarily a valuable one.

(*c*) This is well noted in Cooley on Torts, 50.

(*d*) Cp. Blackstone, Bk. iii. c. 1.

(*e*) It is hardly needful to refer the reader for fuller illustration of the subject to so well known a work as "Mayne on Damages."

His title to recover is a conclusion of law from the facts determined in the cause. How much he shall recover is a matter of judicial discretion exercised, if a jury tries the cause, by the jury under the guidance of the judge. As we have had occasion to point out in a former chapter (*f*), the rule as to "measure of damages" is laid down by the Court and applied by the jury, whose application of it is, to a certain extent, subject to review. The grounds on which the verdict of a jury may be set aside are all reducible to this principle: the Court, namely, must be satisfied not only that its own finding would have been different (for there is a wide field within which opinions and estimates may fairly differ) (*g*), but that the jury did * not [* 157] exercise a due judicial discretion at all. Among these grounds are the awarding of manifestly excessive or manifestly inadequate damages, such as to imply that the jury disregarded, either by excess or by defect, the law laid down to them as to the elements of damage to be considered (*h*), or, it may be, that the verdict represents a compromise between jurymen who were really not agreed on the main facts in issue (*i*).

Nominal damages.

Damages may be nominal, ordinary, or exemplary. Nominal damages are a sum of so little value as compared with the cost and trouble of suing that it may be said to have "no existence in point of quantity" (*k*), such as a shilling or a penny, which sum is awarded with the purpose of not giving any real compensation. Such a verdict means one of two things. According to the nature of the case it may be honourable or contumelious to the plaintiff. Either the purpose of the action is merely to establish a right, no substantial harm or loss having been suffered, or else the jury, while unable to deny that some legal wrong has been done to the plaintiff, have formed a very low opinion of the general merits of his case. This again may be on the ground that the harm he suffered was worth suing for, or that his own conduct had been such that whatever he did suffer at the defendant's hands was morally deserved. The former state of things, where the verdict really

(*f*) P. 27 above.

(*g*) The principle is familiar. See it stated, *e.g.* 5 Q. B. Div. 85.

(*h*) Phillips *v.* L. & S. W. R. Co. (1879) 5 Q. B. Div. 78, where, on the facts shown, a verdict for 7000*l.* was set aside on the ground of the damages being insufficient.

(*i*) Falvy *v.* Stamford (1874) L. R. 10 Q. B. 54.

(*k*) Maule J. 2 C. B. 499.

operates as a simple declaration of rights between the parties, is most commonly exemplified in actions of trespass brought to settle disputed claims to rights of way, [* 158] rights of common, and other easements * and profits. It is not uncommon to give forty shillings damages in these cases if the plaintiff establishes his right, and if it is not intended to express any disapproval of his conduct (*l*). The other kind of award of nominal damages, where the plaintiff's demerits earn him an illusory sum such as one farthing, is illustrated chiefly by cases of defamation, where the words spoken or written by the defendant cannot be fully justified, and yet the plaintiff has done so much to provoke them, or is a person of such generally worthless character, as not to deserve, in the opinion of the jury, any substantial compensation (*m*). This has happened more than once in actions against the publishers of newspapers which were famous at the time, but have not found a place in the regular reports.

Nominal damages possible only when an absolute right is infringed.

The enlarged power of the Court over costs since the Judicature Acts has made the nominal damages, which, under the old procedure, were described as "a mere peg on which to hang costs" (*n*), much less important than it formerly was. But the possibility of recovering [* 159] * nominal damages is still a test, to a certain extent, of the nature of the right claimed. Infringements of absolute rights like those of personal security and property give a cause of action without regard to the amount of harm done, or to there being harm estimable at any substantial sum at all. As Holt C. J. said

(*l*) Under the various statutes as to costs which were in force before the Judicature Acts, 40*s.* was subject to a few exceptions, the least amount of damages which carried costs without a special certificate from the judge. Frequently juries asked before giving their verdict what was the least sum that would carry costs: the general practice of the judges was to refuse this information.

(*m*) Kelly v. Sherlock (1866) L. R. 1 Q. B. 686, is a case of this kind where, notwithstanding that the libels sued for were very gross, the jury gave a farthing damages, and the Court, though not satisfied with the verdict, refused to disturb it.

(*n*) By Maule J. (1846), in Beaumont *v.* Greathead, 2 C. B. 499. Under the present procedure costs are in the discretion of the Court; the costs of a cause tried by jury follow the event (without regard to amount of damages) unless the judge or the Court otherwise orders: Order LXV. r. 1, &c. The effect of the Judicature Acts and Rules of Court in abrogating the older statutes was settled in 1878 by Garnett *v.* Bradley, 3 App. Ca. 944. A sketch of the history of the subject is given in Lord Blackburn's judgment, pp. 962, *sqq.*

in a celebrated passage of his judgment in Ashby *v.* White (*o*), "*a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right.* As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little *diachylon*, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there."

Cases where damage is the gist of the action.

On the other hand, there are cases even in the law of property where, as it is said, damage is the gist of the action, and there is not an absolute duty to forbear from doing a certain thing, but only not to do it so as to cause actual damage. The right to the support of land as between adjacent owners, or as between the owner of surface and owner of the mine beneath, is an example. Here there is not an easement, that is, a positive right to restrain the neighbour's use of his land, but a right to the undisturbed enjoyment of one's own. My neighbour may excavate in his own land as much as he pleases, unless and until there is actual damage to mine: then, and not till then, a cause of action arises for me (*p*). Negligence, * again, [* 160] is a cause of action only for a person who suffers actual harm by reason of it. A man who rides furiously in the street of a town may thereby render himself liable to penalties under a local statute or by-law; but he does no wrong to any man in particular, and is not liable to a civil action, so long as his reckless behaviour is not the cause of specific injury to person or property. The same rule holds of nuisances. So, in an action of deceit, the cause of action is the plaintiff's having suffered damage by acting on the false statement made to him by the defendant (*q*). In all these cases there can be no question of nominal damages, the proof of real damage being the foundation of the plaintiff's right. It may happen, of course, that though there is real

(*o*) 2 Lord Raym. at p. 955.

(*p*) Backhouse *v.* Bonomi (1861) 9 H. L. C. 503; Mitchell *v.* Darley Main Colliery Co. (1885) 11 App. Ca. 127.

(*q*) Pontifex *v.* Bignold, 3 M. & G. 63, is sometimes quoted as if it were an authority that no actual damage is necessary to sustain an action of deceit. But careful examination will show that it is far from deciding this.

damage there is not much of it, and the verdict is accordingly for a small amount. But the smallness of the amount will not make such damages nominal if they are arrived at by a real estimate of the harm suffered. In a railway accident due to the negligence of the railway company's servants one man may be crippled for life, while another is disabled for a few days, and a third only has his clothes damaged to the value of five shillings. Every one of them is entitled, neither more nor less than the others, to have amends according to his loss.

Peculiarity of law of defamation.

In the law of slander we have a curiously fine line between absolute and conditional title to a legal remedy; some kind of spoken defamation being actionable without any allegation or proof of special damage (in which case the plaintiff is entitled to nominal damages [* 161] at least), and * others not; while as to written words no such distinction is made. The attempts of text-books to give a rational theory of this are not satisfactory. Probably the existing condition of the law is the result of some obscure historical accident (*r*).

Ordinary damages.

Ordinary damages are a sum awarded as a fair measure of compensation to the plaintiff, the amount being, as near as can be estimated, that by which he is the worse for the defendant's wrong-doing, but in no case exceeding the amount claimed by the plaintiff himself (*s*). Such amount is not necessarily that which it would cost to restore the plaintiff to his former condition. Where a tenant for years carried away a large quantity of valuable soil from his holding, it was decided that the reversioner could recover not what it would cost to replace the soil, but only the amount by which the value of the reversion was diminished (*t*). In other words compensation, not restitution, is the proper test. Beyond this it is hardly possible to lay down any universal rule for ascertaining the amount, the causes and circumstances of actionable damage being infinitely various. And in particular classes of cases only approximate generalization is possible. In proceedings for the recovery of specific property or its

(*r*) See more in Ch. VII. below.

(*s*) A jury has been known to find a verdict for a greater sum than was claimed, and the judge to amend the statement of claim to enable himself to give judgment for that greater sum. But this is an extreme use of the power of the Court, justifiable only in an extraordinary case.

(*t*) Whitham *v.* Kershaw (1855–6) 16 Q. B. Div. 613.

value there is not so much difficulty in assigning a measure of damages, though here too there are unsettled points (*u*). But in cases of personal injury and consequential damage by loss of gains in a business or profession * it is not possible either [* 162] completely to separate the elements of damage, or to found the estimate of the whole on anything like an exact calculation (*x*). There is little doubt that in fact the process is often in cases of this class even a rougher one than it appears to be, and that legally irrelevant circumstances, such as the wealth and condition in life of the parties, have much influence on the verdicts of juries: a state of things which the law does not recognize, but practically tolerates within large bounds.

Exemplary damages.

One step more, and we come to cases where there is great injury without the possibility of measuring compensation by any numerical rule, and juries have been not only allowed but encouraged to give damages that express indignation at the defendant's wrong rather than a value set upon the plaintiff's loss. Damages awarded on this principle are called exemplary or vindictive. The kind of wrongs to which they are applicable are those which, besides the violation of a right or the actual damage, import insult or outrage, and so are not merely injuries but *iniuriæ* in the strictest Roman sense of the term. The Greek ὕβρις perhaps denotes with still greater exactness the quality of the acts which are thus treated. An assault and false imprisonment under colour of a pretended right in breach of the general law, and against the liberty of the subject (*y*); a wanton trespass on land, persisted in with violent and intemperate behaviour (*z*); the seduction of

(*u*) See Mayne on Damages, c. 13.

(*x*) See the summing-up of Field J. in Phillips *v.* L. & S. W. R. Co. (1879) 5 Q. B. Div. 78, which was in the main approved by the Court of Appeal.

(*y*) Huckle *v.* Money (1763) 2 Wils. 205, one of the branches of the great case of general warrants: the plaintiff was detained about six hours and civilly treated, "entertainened with beefsteaks and beer," but the jury was upheld in giving 300*l.* damages, because "it was a most daring public attack made upon the liberty of the subject."

(*z*) Merest *v.* Harvey (1814) 5 Taunt. 442: the defendant was drunk, and passing by the plaintiff's land on which the plaintiff was shooting, insisted, with oaths and threats, on joining in the sport; a verdict passed for 500*l.*, the full amount claimed, and it was laid down that juries ought to be allowed to punish insult by exemplary damages.

[* 163] a * man's daughter with deliberate fraud, or otherwise under circumstances of aggravation (*a*); such are the acts which, with the open approval of the Courts, juries have been in the habit of visiting with exemplary damages. Gross defamation should perhaps be added; but there it is rather that no definite principle of compensation can be laid down than that damages can be given which are distinctly not compensation. It is not found practicable to interfere with juries either way (*b*), unless their verdict shows manifest mistake or improper motive. There are other miscellaneous examples of an estimate of damages coloured, so to speak, by disapproval of the defendant's conduct (and in the opinion of the Court legitimately so), though it be not a case for vindictive or exemplary damages in the proper sense. In an action for trespass to land or goods substantial damages may be recovered though no loss or diminution in value of property may have occurred (*c*). In an action for negligently pulling down buildings to an adjacent owner's damage, evidence has been admitted that the defendant wanted to disturb the plaintiff in his occupation, and purposely caused the work to be done in a reckless manner: and it was held that the judge might properly authorize a jury to take into consideration the words and conduct of the defendant "showing a contempt of the plaintiff's rights and of his convenience" (*d*).

[* 164] * "It is universally felt by all persons who have had occasion to consider the question of compensation, that there is a difference between an injury which is the mere result of such negligence as amounts to little more than accident, and an injury, wilful or negligent, which is accompanied with expressions of insolence. I do not say that in actions of negligence there should be vindictive damages such as are sometimes given in actions of trespass, but the measure of damage should be different, according to the nature of the in-

---

(*a*) Tullidge *v.* Wade (1769) 3 Wils. 18: "Actions of this sort are brought for example's sake."

(*b*) See Forsdike *v.* Stone (1868) L. R. 3 C. P. 607, where a verdict for 1*s.* was not disturbed, though the imputation was a gross one.

(*c*) Per Denman C. J. in Ex. Ch., Rogers *v.* Spence, 13 M. & W. at p. 581.

(*d*) Emblen *v.* Myers (1860) 6 H. & N. 54; 30 L. J. Ex. 71.

jury and the circumstances with which it is accompanied" (*e*).

The case now cited was soon afterwards referred to by Willes J. as an authority that a jury might give exemplary damages, though the action was not in trespass, from the character of the wrong and the way in which it was done (*f*).

Analogy of breach of promise of marriage to torts in this respect.

The action for breach of promise of marriage, being an action of contract, is not within the scope of this work; but it has curious points of affinity with actions of tort in its treatment and incidents; one of which is that a very large discretion is given to the jury as to damages (*g*).

Mitigation of damages.

As damages may be aggravated by the defendant's ill-behaviour or motives, so they may be reduced by proof of provocation, or of his having acted in good faith: and many kinds of circumstances which will not amount to justification or excuse are for this purpose admissible and material. "In all cases where motive may be ground of *aggravation, evi- [* 165] dence on this score will also be admissible in reduction of damages" (*h*). For the rest, this is an affair of common knowledge and practice rather than of reported authority.

Concurrent but severable causes of action.

"Damages resulting from one and the same cause of action must be assessed and recovered once for all"; but where the same facts give rise to two distinct causes of action, though between the same parties, action and judgment for one of these causes will be no bar to a subsequent action on the other. A man who has had a verdict for personal injuries cannot bring a fresh action if he afterwards finds that his hurt was graver than he supposed. On the other hand, trespass to goods is not the same cause of action as trespass to the person, and the same principle holds of injuries caused not by voluntary trespass, but by negligence; therefore where the plaintiff, driving a cab, was run down by a van negligently driven by the defendant's servant, and the cab

(*e*) Pollock C. B. 6 H. & N. 58; 30 L. J. Ex. 72; C. P. per Bowen, L. J. in Whitham *v.* Kershaw (1886) 16 Q. B. Div. at p. 618.

(*f*) Bell *v.* Midland R. Co. (1861) 10 C. B. N. S. 287, 307; 30 L. J. C. P. 273, 281.

(*g*) See, *e. g.*, Berry *v.* Da Costa (1866) L. R. 1 C. P. 331; and the last chapter of the present work, *ad fin.*

(*h*) Mayne on Damages, 100 (3rd ed.).

was damaged and the plaintiff suffered bodily harm, it was held that after suing and recovering for the damage to the cab the plaintiff was free to bring a separate action for the personal injury (*i*). Apart from questions of form, the right to personal security certainly seems distinct in kind from the right to safe enjoyment of one's goods, and such was the view of the Roman lawyers (*k*).

Injunctions.

Another remedy which is not, like that of damages, universally applicable, but which is applied to many [* 166] kinds * of wrongs where the remedy of damages would be inadequate or practically worthless, is the granting of an injunction to restrain the commission of wrongful acts threatened, or the continuance of a wrongful course of action already begun. There is now no positive limit to the jurisdiction of the Court to issue injunctions, beyond the Court's own view (a judicial view, that is) of what is just and convenient (*l*). Practically, however, the lines of the old equity jurisdiction have thus far been in the main preserved. The kinds of tort against which the remedy is commonly sought are nuisances, violations of specific rights of property in the nature of nuisance, such as obstruction of light and disturbance of easements, continuing trespasses, and infringements of copyright and trademarks. In one direction the High Court has, since the Judicature Acts, distinctly accepted and exercised an increased jurisdiction. It will now restrain, whether by final (*m*) or interlocutory (*n*) injunction, the publication of a libel or, in a clear case, the oral uttering of slander (*o*) calculated to injure the plaintiff in his business : in interlocutory proceedings, however, this jurisdiction is exercised with caution (*n*).

On what principle granted.

The special rules and principles by which the Court is guided in administering this remedy can be profita-

(*i*) Brunsden *v.* Humphrey (1884) 14 Q. B. Div. 141, by Brett M. R. and Bowen L. J., *diss.* Lord Coleridge C. J.

(*k*) Liber homo suo nomine utilem Aquiliae habet actionem : directam enim non habet, quoniam dominus membrorum suorum nemo videtur : Ulpian, D. 9. 2, ad 1. Aquil. 13 pr.

(*l*) Judicature Act, 1873, s. 25, sub-s. 8. Per Jessel M. R., Beddow *v.* Beddow (1878) 9 Ch. D. 89, 93; Quartz Hill &c. Co. *v.* Beall (1882) 20 Ch. Div. at p. 507.

(*m*) Thorley's Cattle Food Co. *v.* Massam (1880) 14 Ch. Div. 763; Thomas *v.* Williams, *ib.* 864.

(*n*) Quartz Hill Consolidated Gold Mining Co. *v.* Beall (1882) 20 Ch. Div. 501.

(*o*) Hermann Loog *v.* Bean (1884) 26 Ch. Div. 306.

bly discussed only in connexion with the particular causes of action upon which it is sought. All of them, however, are developments of the one general principle that an injunction * is granted only where [* 167] damages would not be an adequate remedy, and an interim injunction only where delay would make it impossible or highly difficult to do complete justice at a later stage (*p*). In practice very many causes were in the Court of Chancery, and still are, really disposed of on an application for an injunction which is in form interlocutory: the proceedings being treated as final by consent, when it appears that the decision of the interlocutory question goes to the merits of the whole case.

Former concurrent jurisdiction of common law and equity to give compensation for fraud.

In certain cases of fraud (that is, wilfully or recklessly false representation of fact) the Court of Chancery had before the Judicature Acts concurrent jurisdiction with the courts of common law, and would award pecuniary compensation, not in the name of damages indeed, but by way of restitution or "making the representation good" (*q*). In substance, however, the relief came to giving damages under another name, and with more nicety of calculation than a jury would have used. Since the Judicature Acts it does not appear to be material whether the relief administered in such a case be called damages or restitution; unless indeed it were contended in such a case that (according to the rule of damages as regards injuries to property) (*r*) the plaintiff was entitled not to be restored to his former position or have his just expectation fulfilled, * but only to recover the amount by which he [* 168] is actually the worse for the defendant's wrong-doing. Any contention of that kind would no doubt be effectually excluded by the authorities in equity; but even without them it would scarcely be a hopeful one.

Special statutory

Duties of a public nature are constantly defined or created by statute, and generally, though not invaria-

(*p*) In Mogul Steamship Co. *v.* M'Gregor, Gow & Co. (1885) 15 Q. B. D. 476, the Court refused to grant an interlocutory injunction to restrain a course of conduct alleged to amount to a conspiracy of rival shipowners to drive the plaintiffs' ships out of the China trade.

(*q*) Burrowes *v.* Lock (1805) 10 Ves. 470; Slim *v.* Croucher (1860) 1 D. F. J. 518; Peck *v.* Gurney (1871-3) L. R. 13 Eq. 79; 6 H. L. 377. See under the head of Deceit, Ch. VIII. below.

(*r*) Jones *v.* Gooday (1841) 8 M. & W. 146; 10 L. J. Ex. 275; Wigsell *v.* School for Indigent Blind (1882) 8 Q. B. D. 357; Whitham *v.* Kershaw (1885-6) 16 Q. B. Div. 613.

remedies, when exclusive.

bly, special modes of enforcing them are provided by the same statutes. Questions have arisen as to the rights and remedies of persons who suffer special damage by the breach or non-performance of such duties. Here it is material (though not necessarily decisive) to observe to whom and in what form the specific statutory remedy is given. If the Legislature, at the same time that it creates a new duty, points out a special course of private remedy for the person aggrieved (for example, an action for penalties to be recovered, wholly or in part, for the use of such person), then it is generally presumed that the remedy so provided was intended to be, and is, the only remedy. The provision of a public remedy without any special means of private compensation is in itself consistent with a person specially aggrieved having an independent right of action for injury caused by a breach of the statutory duty (*s*). And it has been thought to be a general rule that where the statutory remedy is not applicable to the compensation of a person injured, that person has a right of action (*t*). But the Court of Appeal has repudiated any such fixed rule, and has laid down that the [* 169] possibility or otherwise of * a private right of action for the breach of a public statutory duty must depend on the scope and language of the statute taken as a whole. A waterworks company was bound by the Waterworks Clauses Act, 1847, incorporated in the company's special Act, to maintain a proper pressure in its pipes, under certain public penalties. It was held that an inhabitant of the district served by the company under this Act had no cause of action against the company for damage done to his property by fire by reason of the pipes being insufficiently charged. The Court thought it unreasonable to suppose that Parliament intended to make the company insurers of all property that might be burnt within their limits by reason of deficient supply or pressure of water (*u*).

(*s*) Ross *v.* Rugge-Price (1876) 1 Ex. D. 269: but *qu.* whether this case can now be relied on; it was decided partly on the authority of Atkinson *v.* Newcastle Waterworks Co. (1871) L. R. 6 Ex. 404, afterwards reversed in the Court of Appeal (see below).

(*t*) Couch *v.* Steel (1854) 3 E. & B. 402; 23 L. J. Q. B. 121.

(*u*) Atkinson *v.* Newcastle Waterworks Co. (1877) 2 Ex. Div. 441. Cp. Stevens *v.* Jeacocke (1847) 11 Q. B. 731; 17 L. J. Q. B. 163, where it was held that the local Act regulating, under penalties, the pilchard fishery of St. Ives, Cornwall, did not create private rights enforceable by action; Vestry of St. Pancras *v.* Batterbury (1857) 2 C. B. N. S. 477; 26 L. J. C. P. 243, where

Also the harm in respect of which an action is brought for the breach of a statutory duty must be of the kind which the statute was intended to prevent. If cattle being carried on a ship are washed overboard for want of appliances prescribed by an Act of Parliament for purely sanitary purposes, the shipowner is not liable to the owner of the cattle by reason of the breach of the statute (*v*): though he will be liable if his conduct amounts to negligence apart from the statute and with regard to the duty of safe carriage which he has undertaken (*x*), and in an * action not founded on [* 170] a statutory duty the disregard of such a duty, if likely to cause harm of the kind that has been suffered, may be a material fact(*y*).

No private redress unless the harm suffered is withiu the mischief aimed at by the statute.

Where more than one person is concerned in the commission of a wrong, the person wronged has his remedy against all or any one or more of them at his choice. Every wrong-doer is liable for the whole damage, and it does not matter (as we saw above) (*z*), whether they acted, as between themselves, as equals, or one of them as agent or servant of another. There are no degrees of responsibility, nothing answering to the distinction in criminal law between principals and accessories. But when the plaintiff in such a case has made his choice, he is concluded by it. After recovering judgment against some or one of the joint authors of a wrong, he cannot sue the other or others for the same matter, even if the judgment in the first action remains unsatisfied. By that judgment the cause of action "transit in rem iudicatam," and is no longer available (*a*). The reason of the rule is stated to be that otherwise a vexatious multiplicity of actions would be encouraged.

Joint wrong-doers may he sued jointly or severally:

but judgment against any is bar to further action.

As between joint wrong-doers themselves, one who has been sued alone and compelled to pay the whole

Rules as to contri-

a statutory provision for recovery by summary proceedings was held to exclude any right of action (here, however, no private damage was in question); and Vallance *v.* Falle (1884) 13 Q. B. D. 109.

(*v*) Gorris *v.* Scott (1874) L. R. 9 Ex. 125.

(*x*) See per Pollock B. at p. 131.

(*y*) Blamires *v.* Lanc. and Yorkshire R. Co. (1873) Ex. Ch. L. R. 8 Ex. 283.

(*z*) Page 63.

(*a*) Brinsmead *v.* Harrison (1872) Ex. Ch. L. R. 7 C. P. 547, finally settled the point. It was formerly doubtful whether judgment without satisfaction was a bar. And in the United States it seems to be generally held that it is not: Cooley on Torts, 138, and see L. R. 7 C. P. 549.

bntion and indemnity.

damages has no right to indemnity or contribution from the other (*b*), if the nature of the case is such [* 171] that he "must * be presumed to have known that he was doing an unlawful act" (*c*). Otherwise, "where the matter is indifferent in itself," and the wrongful act is not clearly illegal (*d*), but may have been done in honest ignorance, or in good faith to determine a claim of right, there is no objection to contribution or indemnity being claimed. "Every man who employs another to do an act which the employer appears to have a right to authorize him to do undertakes to indemnify him for all such acts as would be lawful if the employer had the authority he pretends to have." Therefore an auctioneer who in good faith sells goods in the way of his business on behalf of a person who turns out to have no right to dispose of them is entitled to be indemnified by that person against the resulting liability to the true owner (*e*). And persons intrusted with goods as wharfingers or the like who stop delivery in pursuance of their principal's instructions may claim indemnity if the stoppage turns out to be wrongful, but was not obviously so at the time (*f*). In short, the proposition that there is no contribution between wrong-doers must be understood to affect only those who are wrong-doers in the common sense of the word as well as in law. The wrong must be so manifest that the person doing it could not at the time reasonably suppose that he was acting under lawful authority. Or, to put it summarily, a wrong-doer by misadventure is entitled to indemnity from any person under whose apparent authority he acted in good faith; a wilful or negligent (*g*) wrong-doer has no claim to [* 172] contribution or * indemnity. There does not appear any reason why contribution should not be due in some cases without any relation of agency and authority between the parties. If several persons undertake in concert to abate an obstruction to a supposed

(*b*) Merryweather *v.* Nixon (1799) 8 T. R. 186, where the doctrine is too widely laid down.

(*c*) Adamson *v.* Jarvis, 4 Bing. at p. 73.

(*d*) Betts *v.* Gibbins, 2 A. & E. 57.

(*e*) Adamson *v.* Jarvis (1827) 4 Bing. 66, 72. The ground of the action for indemnity may be either deceit or warranty: see at p. 73.

(*f*) Betts *v.* Gibbins (1834) 2 A. & E. 57. See too Collins *v.* Evans (Ex. Ch.) 5 Q. B. at p. 830.

(*g*) I am not sure that authority covers this. But I do not think an agent could claim indemnity for acts which a reasonable man in his place would know to be beyond the lawful power of the principal. See Indian Contract Act, s. 223.

highway, having a reasonable claim of right and acting in good faith for the purpose of trying the right, and it turns out that their claim cannot be maintained, it seems contrary to principle that one of them should be compellable to pay the whole damages and costs without any recourse over to the others. I cannot find, however, that any decision has been given on facts of this kind; nor is the question very likely to arise, as the parties would generally provide for expenses by a subscription fund or guaranty.

Supposed rule of trespass being "merged in felony."

It has been currently said, sometimes laid down, and once or twice acted on as established law, that when the facts affording a cause of action in tort are such as to amount to a felony, there is no civil remedy against the felon (*h*) for the wrong, at all events before the crime has been prosecuted to conviction. And as, before 1870 (*i*), a convicted felon's property was forfeited, there would at common law be no effectual remedy afterwards. So that the compendious form in which the rule was often stated, * that "the trespass [* 173] was merged in the felony," was substantially if not technically correct. But so much doubt has been thrown upon the supposed rule in several recent cases, that it seems, if not altogether exploded, to be only awaiting a decisive abrogation. The result of the cases in question is that, although it is difficult to deny that some such rule exists, the precise extent of the rule, and the reasons of policy on which it is founded, are uncertain, and it is not known what is the proper mode of applying it. As to the rule, the best supported version of it appears to be to this effect: Where the same facts amount to a felony and are such as in themselves would constitute a civil wrong, a cause of action for the civil wrong does arise. But the remedy is not available for a person who might have prosecuted the wrong-doer for the felony, and has failed to do so. The plaintiff ought to show that the felon has actually been prosecuted to conviction (by whom it does not

(*h*) It is settled that there is no rule to prevent the suing of a person who was not party or privy to the felony. Stolen goods, or their value, *e.g.* can be recovered from an innocent possessor who has not bought in market overt, whether the thief has been prosecuted or not: Marsh *v.* Keating (1834) 1 Bing. N. C. 198, 217; White *v.* Spettigue (1845) 13 M. & W. 603; 14 L. J. Ex. 99. In these cases indeed the cause of action is not the offence itself, but something else which is wrongful because an offence has been committed.

(*i*) 33 & 34 Vict. c. 23.

matter, nor whether it was for the same specific offence), or that prosecution is impossible (as by the death of the felon or his immediate escape beyond the jurisdiction), or that he has endeavoured to bring the offender to justice, and has failed without any fault of his own (*k*).

No known means of enforcing the rule, if indeed it exists.

It is admitted that when any of these conditions is satisfied there is both a cause of action and a presently available remedy. But if not, what then? It is said to be the duty of the person wronged to prosecute for the felony before he brings a civil action; "but by what means that duty is to be enforced, we are nowhere informed" (*l*). Its non-performance is not a defence which can be set up by pleading (*m*), nor is a statement of claim bad for showing on the face of it that the [* 174] wrongful act * was felonious (*n*). Neither can the judge nonsuit the plaintiff if this does not appear on the pleadings, but comes out in evidence at the trial (*o*). It has been suggested that the Court might in a proper case, on the application of the Crown or otherwise, exercise its summary jurisdiction to stay proceedings in the civil action (*p*): but there is no example of this. Whatever may be the true nature and incidents of the duty of the wronged party to prosecute, it is a personal one and does not extend to a trustee in bankruptcy (*q*), nor, it is conceived, to executors in the cases where executors can sue. On the whole there is apparent in quarters of high authority a strong though not unanimous disposition to discredit the rule as a mere *cantilena* of text-writers founded on ambiguous or misapprehended cases, or on dicta which themselves were open to the same objections (*r*). At the same time

(*k*) See the judgment of Baggallay L. J. in Ex parte Ball (1879) 10 Ch. Div. at p. 673. For the difficulties see per Bramwell L. J., *ib* at p. 671.

(*l*) Lush J., Wells *v.* Abrahams (1872) L. R. 7 Q. B. at p. 563.

(*m*) Blackburn J. *ibid.*

(*n*) Roope *v.* D'Avigdor (1883) 10 Q. B. D. 412, cp. Midland Insurance Co. *v.* Smith (1881) 6 Q. B. D. 561.

(*o*) Wells *v.* Abrahams (1872) L. R. 7 Q. B. 554, dissenting from Wellock *v.* Constantine (1863) 2 H. & C. 146; 32 L. J. Ex. 285, a very indecisive case, but the nearest approach to an authority for the enforcement of the supposed rule in a court of common law.

(*p*) Blackburn J. L. R. 7 Q. B. at p. 559.

(*q*) *Ex parte* Ball (1879) 10 Ch. D. 667.

(*r*) See the historical discussion in the judgment of Blackburn J. in Wells *v.* Abrahams, L. R. 7 Q. B. 560, *sqq.* And see per Maule J. in Ward *v.* Lloyd (1843) 7 Scott N. R. 499, 507, a case of alleged compounding of felony: "It would be a strong thing to say that every man is bound to prosecute all the felonies that

it is certain that the judges consulted by the House of Lords in Marsh *v.* Keating (*s*) thought such a rule existed, though it was not applicable to the case in hand; and that in Ex parte Elliott (*t*) it was effectually applied to exclude a proof in bankruptcy.

Locality of wrongful act as affecting remedy in English court.

* Lastly we have to see under what conditions [* 175] there may be a remedy in an English court for an act in the nature of a tort committed in a place outside the territorial jurisdiction of the court. It is needless to state formally that no action can be maintained in respect of an act which is justified or excused according to both English and local law. Besides this obvious case, the following states of things are possible.

Acts not wrongful by English law.

1. The act may be such that, although it may be wrongful by the local law, it would not be a wrong if done in England. In this case no action lies in an English court. The court will not carry respect for a foreign municipal law so far as to "give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed" (*u*).

Acts justified by local law.

2. The act, though in itself it would be a trespass by the law of England, may be justified or excused by the local law. Here also there is no remedy in an English court (*x*). And it makes no difference whether the act was from the first justifiable by the local law, or, not being at the time justifiable, was afterwards ratified or excused by a declaration of indemnity proceeding from the local sovereign power. In the well-known case of Phillips *v.* Eyre (*y*), where the defendant was governor of Jamaica at the time of the trespasses complained of, an Act of indemnity subsequently passed by the colonial Legislature was held effectual to prevent the defendant

come to his knowledge; and I do not know why it is the duty of the party who suffers by the felony to prosecute the felon, rather than that of any other person: on the contrary, it is a Christian duty to forgive one's enemies; and I think he does a very humane and charitable and Christian-like thing in abstaining from prosecuting."

Good hook for a cunning to hang on.

(*s*) 1 Bing. N. C. 198, 217 (1834).

(*t*) 3 Mont. & A. 110 (1837).

(*u*) The Halley (1868) L. R. 2 P. C. 193, 304; The M. Moxham, 1 P. Div. 107.

(*x*) Blad's Case, Blad *v.* Bamfield (1673–4) in P. C. and Ch., 3 Swanst. 603–4, from Lord Nottingham's MSS.; The M. Moxham, 1 P. Div. 107.

(*y*) Ex. Ch. L. R. 6 Q. B. 1 (1870).

from being liable in an action for assault and false im- [* 176] prisonment brought in * England. But nothing less than justification by the local law will do. Conditions of the *lex fori* suspending or delaying the remedy in the local courts will not be a bar to the remedy in an English court in an otherwise proper case (*z*). And our courts would possibly make an exception to the rule if it appeared that by local law there was no remedy at all for a manifest wrong, such as assault and battery committed without any special justification or excuse (*a*).

Act wrongful by both laws.

3. The act may be wrongful by both the law of England and the law of the place where it was done. In such a case an action lies in England, without regard to the nationality of the parties (*b*), provided the cause of action is not of a purely local kind, such as trespass to land. This last qualification was formerly enforced by the technical rules of venue, with the distinction thereby made between *local* and *transitory* actions: but it seems to involve matter of real principle, though since the Judicature Acts abolished the technical forms an occasion of re-stating the principle has not yet arisen (*c*). It cannot well have been the intention of the Judicature Acts to throw upon our courts the duty of trying (for example) an action for disturbing a right to use a stream in Bengal for irrigation, or to float timber down a particular river in Canada; the result of which would be that the most complicated questions of local law might have to be dealt with here as matters of fact, not incidentally (as must now and then unavoidably happen in various cases), but as the very substance of this issue (*d*).

Judgment of Ex. Ch. in Phillips *v.* Eyre.

[* 177] * We have stated the law for convenience in a series of distinct propositions. But, considering the importance of the subject, it seems desirable also to reproduce the continuous view of it given in the judgment

(*z*) Scott *v.* Seymour (1862) Ex. Ch. 1 H. & C. 219; 32 L. J. Ex. 61.

(*a*) *Ib.* per Wightman and Willes JJ.

(*b*) Per Cur., The Halley, L. R. 2 P. C. at p. 202.

(*c*) See per Lord Cairns, Whitaker *v.* Forbes (1875) 1 C. P. Div. at p. 52, and the notes to Mostyn *v.* Fabrigas in Smith's Leading Cases.

(*d*) It was doubted by James L. J. (since the Judicature Acts) whether the Court could entertain proceedings in respect of an injury done to foreign soil. The M. Moxham (1876) 1 P. Div. at p. 109. The other members of the Court said nothing on this point.

of the Exchequer Chamber delivered by Willes J. in Phillips *v.* Eyre :—

"Our courts are said to be more open to admit actions founded upon foreign transactions than those of any other European country; but there are restrictions in respect of locality which exclude some foreign causes of action altogether, namely, those which would be local if they arose in England, such as trespass to land: Doulson *v.* Mathews (*e*); and even with respect to those not falling within that description our courts do not undertake universal jurisdiction. As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England: therefore, in The Halley (*f*) the Judicial Committee pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium for collision caused by the act of a pilot whom the shipowner was compelled by that law to employ, and for whom, therefore, as not being his agent, he was not responsible by English law. Secondly, the act must not have been justifiable by the law of the place where it was done. Therefore in Blad's Case (*g*), and Blad *v.* Bangeld (*h*), Lord Nottingham held that a seizure in Iceland, authorized by the Danish Government and valid by the law of the place, could not be questioned by civil action in England, although * the plaintiff, an Eng- [* 178] lishman, insisted that the seizure was in violation of a treaty between this country and Denmark—a matter proper for remonstrance, not litigation. And in Dobree *v.* Napier (*i*), Admiral Napier having, when in the service of the Queen of Portugal, captured in Portuguese water an English ship breaking blockade, was held by the Court of Common Pleas to be justified by the law of Portugal and of nations, though his serving under a foreign prince was contrary to English law, and subjected him to penalties under the Foreign Enlistment Act. And in Reg. *v.* Lesley (*k*), an imprisonment in Chili on board a British ship, lawful there, was held by Erle C. J., and the Court for Crown cases Reserved, to

(*e*) 4 T. R. 503 (1792: no action here for trespass to land in Canada). The student will bear in mind that Phillips *v.* Eyre (1870) was before the Judicature Acts.
(*f*) L. R. 2 P. C. 193 (1868).
(*g*) 3 Swanst. 603.
(*h*) 3 Swanst. 604.
(*i*) 2 Bing. N. C. 781 (1836).
(*k*) Bell C. C. 220; 29 L. J. M. C. 97 (1860).

Pollock is right as to the assault + battery but there would be an action for false imprisonment.

be no ground for an indictment here, there being no independent law of this country making the act wrongful or criminal. As to foreign laws affecting the liability of parties in respect of bygone transactions, the law is clear that, if the foreign law touches only the remedy or procedure for enforcing the obligation, as in the case of an ordinary statute of limitations, such law is no bar to an action in this country; but if the foreign law extinguishes the right it is a bar in this country equally as if the extinguishment had been by a release of the party, or an act of our own Legislature. This distinction is well illustrated on the one hand by Huber *v.* Steiner (*l*), where the French law of five years' prescription was held by the Court of Common Pleas to be no answer in this country to an action upon a French promissory note, because that law dealt only with procedure, and the time and manner of suit (*tempus et modum actionis instituendae*), and did not affect to destroy the obligation of the contract (*valorem contrac-*
[* 179] *tus;* and on the * other hand by Potter *v.* Brown (*m*), where the drawer of a bill at Baltimore upon England was held discharged from his liability for the non-acceptance of the bill here by a certificate in bankruptcy, under the law of the United States of America, the Court of Queen's Bench adopting the general rule laid down by Lord Mansfield in Ballantine *v.* Golding (*n*), and ever since recognized, that 'what is a discharge of a debt in the country where it is contracted is a discharge of it everywhere.' So that where an obligation by contract to pay a debt or damages is discharged and avoided by the law of the place where it was made, the accessory right of action in every court open to the creditor unquestionably falls to the ground. And by strict parity of reasoning, where an obligation *ex delicto* to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided. Cases may possibly arise in which distinct and independent rights or liabilities or defences are created by positive and specific laws of this country in respect of foreign transactions; but there is no such law (unless it be the Governors Act already discussed and disposed of) applicable to the present case."

Limitation of actions.

The times in which actions of tort must be brought

(*l*) 2 Bing. N. C. 202.
(*m*) 5 East 124.
(*n*) Cooke's Bankrupt Law, 487.

are fixed by the Statute of Limitation of James I. (21 Jac. 1, c. 16) as modified by later enactments (*o*). No general principle is laid down, but actionable wrongs are in effect divided into three classes, with a different term of limitation for each. These terms, and the causes of action to which they apply, are as follows, the result being stated, without regard to the actual words of the statute, according to the modern construction and practice:—

** Six years.* [* 180]

Trespass to land and goods, conversion, and all other common law wrongs (including libel) except slander by words actionable *per se* (*p*) and injuries to the person.

Four years.

Injuries to the person (including imprisonment).

Two years.

Slander by words actionable *per se*.

Suspension of the statute by disabilities.

Persons who at the time of their acquiring a cause of action are infants, married women, or lunatics (*q*), have the period of limitation reckoned against them only from the time of the liability ceasing; and if a defendant is beyond seas at the time of the right of action arising, the time runs against the plaintiff only from his return. No part of the United Kingdom or of the Channel Islands is deemed to be beyond seas for this purpose (*q*). If one cause of disability supervenes on another unexpired one (as where a woman marries under age), the period of limitation probably runs only from the expiration of the latter disability (*r*).

Where damage is the gist of the action, the time runs only from the actual happening of the damage (*s*).

(*o*) See the text of the statutes, Appendix C.

(*p*) See Blake Odgers, Digest of Law of Libel, 455–6.

(*q*) Plaintiffs imprisoned or being beyond the seas had the same right by the statute of James I., but this was abrogated by 19 & 20 Vict. c. 97 (the Mercantile Law Amendment Act. 1856), s. 10. The existing law as to defendants beyond seas is the result of 4 & 5 Ann. c. 3 [al. 16], s. 19, as explained by 19 & 20 Vict. c. 97, s. 12. As to the retrospective effect of s. 10, see Pardo *v.* Bingham (1869) 4 Ch. 735.

(*r*) Cp. Borrows *v.* Ellison (1871) L. R. 6 Ex. 128 (on the Real Property Limitation Act. 3 & 4 Wm. 4, c. 27); but the language of the two statutes might be distinguished.

(*s*) Backhouse *v.* Bonomi (1861) 9 H. L. C. 503; 34 L. J. Q. B. 181; Darley Main Colliery Co. *v.* Mitchell (1886) 11 App. Ca. 127, affirming *S. C.* 14 Q. B. Div. 125.

Protection of justices, constables, &c.

Justices of the peace (*t*) and constables (*u*) are pro- [* 181] tected * by general enactments that actions against them for anything done in the execution of their office must be brought within six months of the act complained of.

The enforcement of statutory duties is often made subject by the same Acts which create the duties to a short period of limitation. These provisions do not really belong to our subject, but to various particular branches of public law.

Exception of concealed fraud.

The operation of the Statute of Limitation is further subject to the exception of concealed fraud, derived from the doctrine and practice of the Court of Chancery, which, whether it thought itself bound by the terms of the statute, or only acted in analogy to it (*x*), considerably modified its literal application. Where a wrong-doer fraudulently conceals his own wrong, the period of limitation runs only from the time when the plaintiff discovers the truth, or with reasonable diligence would discover it. Such is now the rule of the Supreme Court in every branch of it and in all causes (*y*).

It has often been remarked that, as matter of policy, the periods of limitation fixed by the statute of James are unreasonably long for modern usage; but modern legislation has done nothing beyond removing some of the privileged disabilities.

Conclusion of General Part.

We have now reviewed the general principles which are common to the whole law of Torts as to liability, as to exceptions from liability, and as to remedies. In the following part of this work we have to do with the several distinct kinds of actionable wrongs, and the law peculiarly applicable to each of them.

(*t*) 11 & 12 Vict. c. 44, s. 8.

(*u*) 24 Geo. 2, c. 44, s. 8.

(*x*) See 9 Q. B. Div. 68, per Brett L. J.

(*y*) Gibbs *v.* Guild (1882) 9 Q. B. Div. 59, which makes the equitable doctrine of general application without regard to the question whether before the Judicature Acts the Court of Chancery would or would not have had jurisdiction in the case.

SPECIFIC WRONGS.

CHAPTER VI.

PERSONAL WRONGS.

I.—*Assault and Battery.*

Preliminary.

Security for the person is among the first conditions of civilized life. The law therefore protects us, not only against actual hurt and violence, but against every kind of bodily interference and restraint not justified or excused by allowed cause, and against the present apprehension of any of these things. The application of unlawful force to another constitutes the wrong called battery; an action which puts another in instant fear of unlawful force, though no force be actually applied, is the wrong called assault. These wrongs are likewise indictable offences, and under modern statutes can be dealt with by magistrates in the way of summary jurisdiction, which is the kind of redress most in use. Most of the learning of assault and battery, considered as civil injuries, turns on the determination of the occasions and purposes by which the use of force is justified. The elementary notions are so well settled as to require little illustration.

What shall be said a battery.

"The least touching of another in anger is a battery" (*a*); * "for the law cannot draw the line be- [* 183] tween different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner" (*b*). It is immaterial not only whether the force applied be sufficient in degree to cause actual hurt, but whether it be of such a kind as is likely to cause it. Some interfer-

(*a*) Holt C. J., Cole *v.* Turner (1705) 6 Mod. 149, and Bigelow L. C. 218.

(*b*) Blackst. Comm. iii. 120.

ences with the person which cause no bodily harm are beyond comparison more insulting and annoying than others which do cause it. Spitting in a man's face is more offensive than a blow, and is as much a battery in law (*c*). Again it does not matter whether the force used is applied directly or indirectly, to the human body itself or to anything in contact with it; nor whether with the hand or anything held in it, or with a missile (*d*).

What an assault.

Battery includes assault, and though assault strictly means an inchoate battery, the word is in modern usage constantly made to include battery. No reason appears for maintaining the distinction of terms in our modern practice: and in the draft Criminal Code of 1879 "assault" is deliberately used in the larger popular sense. "An assault" (so runs the proposed definition) "is the act of intentionally applying force to the person of another directly or indirectly, or attempting or threatening by any act or gesture to apply such force to the person of another, if the person making the threat [* 184] causes the other to believe (*e*) * upon reasonable grounds that he has present ability to effect his purpose" (*f*).

Examples of acts which amount to assaulting a man are the following: "Striking at him with or without a weapon, or presenting a gun at him at a distance to which the gun will carry, or pointing a pitchfork at him, standing within the reach of it, or holding up one's fist at him, or drawing a sword and waving it in a menacing manner" (*g*). The essence of the wrong is

(*c*) R. *v.* Cotesworth, 6 Mod. 172.

(*d*) Pursell *v.* Horne (1838) 3 N. & P. 564 (throwing water *at* a person is assault; if the water falls *on* him as intended, it is battery also). But there is much older authority, see Reg. Brev. 108 b, a writ for throwing "quendam liquorem calidum" on the plaintiff: "casus erat huiusmodi praecedentis brevis: quaedam mulier proiecit super aliam mulierem ydromellum quod anglice dicitur worte quod erat nimis calidum."

(*e*) One might expect, "believes or causes," &c.; but this would be an extension of the law. No assault is committed by presenting a gun at a man who cannot see it, any more than by forming an intention to shoot at him.

(*f*) Criminal code (Indictable Offences) Bill, s. 203. Mr. Justice Stephen's definition in his Digest (art. 241) is more elaborate; and the Indian Penal Code has an extremely minute definition of "using force to another" (s. 349). As Mr. Justice Stephen remarks, if legislators begin defining in this way it is hard to see what they can assume to be known.

(*g*) Bacon Abr. "Assault and Battery," A; Hawkins P. C. i. 110.

putting a man in present fear of violence, so that any act fitted to have that effect on a reasonable man may be an assault, though there is no real present ability to do the harm threatened. Thus it may be an assault to present an unloaded fire-arm (*h*), or even, it is apprehended, anything that looks like a fire-arm. So if a man is advancing upon another with apparent intent to strike him, and is stopped by a third person before he is actually within striking distance, he has committed an assault (*i*). * Acts capable in themselves [* 185] of being an assault may on the other hand be explained or qualified by words or circumstances contradicting what might otherwise be inferred from them. A man put his hand on his sword and said, "If it were not assize-time, I would not take such language from you;" this was no assault, because the words excluded an intention of actually striking (*k*).

Excusable acts.

Hostile or unlawful intention is necessary to constitute an indictable assault; and such touching, pushing, or the like as belongs to the ordinary conduct of life, and is free from the use of unnecessary force, is neither an offence nor wrong. "If two or more meet in a narrow passage, and without any violence or design of harm the one touches the other gently, it will be no battery" (*l*). The same rule holds of a crowd of people going into a theatre or the like (*m*). Such accidents are treated as inevitable, and create no right of action even for nominal damages. In other cases an intentional touching is justified by the common usage of civil intercourse, as when a man gently lays his hand on another to attract attention. But the use of needless

---

(*h*) R. *v.* James (1844) 1 C. & K. 530, is apparently to the contrary. Tindal C. J. held that a man could not be convicted of an attempt to discharge a loaded fire-arm under a criminal statute, nor even of an assault, if the arm is (as by defective priming) not in a state capable of being discharged; but this opinion (also held by Lord Abinger, Blake *v.* Barnard, 9 C. & P. at p. 628) is against that of Parke B. in R. *v.* St. George (1840) 9 C. & P. 483, 493, which would almost certainly be followed at this day.

(*i*) Stephens *v.* Myers, 4 C. & P. 349; Bigelow L. C. 217. A large proportion of the authorities on this subject are Nisi Prius cases (cp. however Read *v.* Coker (1853) 13 C. B. 850; 22 L. J. C. P. 201): see the sub-titles of Assault under Criminal Law and Trespass in Fisher's Digest. Some of the dicta, as might be expected, are in conflict.

(*k*) Tuberville *v.* Savidge (1669) 1 Mod. 3.

(*l*) Holt C. J., Cole *v.* Turner, 6 Mod. 149.

(*m*) Steph. Dig. Cr. Law, art. 241, illustrations.

force for this purpose, though it does not seem to entail criminal liability where no actual hurt is done, probably makes the act civilly wrongful (*n*).

Mere passive obstruction is not an assault, as where a man by standing in a doorway prevents another from coming in (*o*).

Words cannot of themselves amount to an assault [* 186] under * any circumstances, though it is said that a contrary opinion formerly prevailed :

> " For Meade's case proves, or my Report's in fault,
> That singing can't be reckoned an assault " (*p*)

There is little direct authority on the point, but no doubt is possible.

Consent, or in the common phrase "leave and licence," will justify many acts which would otherwise be assaults (*q*), striking in sport for example; or even, if coupled with reasonable cause, wounding and other acts of a dangerous kind, as in the practice of surgery. But consent will not make acts lawful which are a breach of the peace, or otherwise criminal in themselves, or unwarrantably dangerous. To the authorities already cited (*r*) under the head of General Exceptions we may add Hawkins' paragraph on the matter.

" It seems to be the better opinion that a man is in no danger of such a forfeiture [of recognizances for keeping the peace] from any hurt done to another by playing at cudgels, or such like sport, by consent, because the intent of the parties seems no way unlawful, but rather commendable, and tending mutually to promote activity and courage. Yet it is said that he who wounds another in fighting with naked swords does in [* 187] strictness forfeit such a * recognizance, be-

---

(*n*) Coward *v.* Baddeley (1859) 4 H. & N. 478; 28 L. J. Ex. 260.

(*o*) Jones *v.* Wylie (1844) 1 C. & K. 257.

(*p*) The Circuiteers, by John Leycester Adolphus (the supposed speaker is Sir Gregory Lewin), 1 L. Q. R. 232; Meade's and Belt's ca. 1 Lewin C. C. 184: "no *words* or *singing* are equivalent to an assault," per Holroyd J. Cp. Hawkins P. C. i. 110. For the older view see 27 Ass. 134, pl. 11, 17 Ed. IV. 3, pl. 2, 26 Hen. VI. 20 *b*, pl. 8.

(*q*) Under the old system of pleading this was not a matter of special justification, but evidence under the general issue, an assault by consent being a contradiction in terms: Christopherson *v.* Bare (1848) 11 Q. B. 473; 17 L. J. Q. B. 109. But this has long ceased to be of any importance in England.

(*r*) P. 92 above.

cause no consent can make so dangerous a diversion lawful" (*s*).

It has been repeatedly held in criminal cases of assault that an unintelligent assent, or a consent obtained by fraud, is of no effect (*t*). The same principles would no doubt be applied by courts of civil jurisdiction if necessary.

Selfdefence.

When one is wrongfully assaulted it is lawful to repel force by force (as also to use force in the defence of those whom one is bound to protect, or for keeping the peace), provided that no unnecessary violence be used. How much force, and of what kind, it is reasonable and proper to use in the circumstances must always be a question of fact, and as it is incapable of being concluded beforehand by authority, so we do not find any decisions which attempt a definition. We must be content to say that the resistance must "not exceed the bounds of mere defence and prevention" (*u*), or that the force used in defence must be not more than "commensurate" with that which provoked it (*v*.) It is obvious, however, that the matter is of much graver importance in criminal than in civil law (*x*).

Menace distinguished from assault.

Menace without assault is in some cases actionable. But this is on the ground of its causing a certain special kind of damage; and then the person menaced need not be the * person who suffers damage. In [* 188] fact the old authorities are all, or nearly all, on intimidation of a man's servants or tenants whereby he loses their service or dues. Therefore, though under the old forms of action this wrong was of the same genus with assault and battery, we shall find it more convenient to consider it under another head. Verbal threats of personal violence are not, as such, a ground of civil action at all. If a man is thereby put in reasonable

This answers a question.

(*s*) Hawkins P. C. i. 484. The Roman law went even farther in encouraging contests "gloriae causa et virtutis, D. 9. 2, ad l. Aquil. 7, § 4.

(*t*) Cases collected in Fisher's Dig. ed. Mews, 2081-2. Similarly where consent is given to an unreasonably dangerous operation or treatment by one who relies on the prisoner's skill, it does not excuse him from the guilt of manslaughter if death ensues: Commonwealth *v.* Pierce, 138 Mass. 165, 180.

(*u*) Blackst. Comm. iii. 4.

(*v*) Reece *v.* Taylor, 4 N. & M. 470.

(*x*) See Stephen's Digest of the Criminal Law, art. 200, and cp. Criminal Code Bill, ss. 55—57. There are many modern American decisions, chiefly in the Southern and Western States. See Cooley on Torts, 165.

bodily fear he has his remedy, but not a civil one, namely by security of the peace.

Summary proceedings when a bar to civil action.

Where an assault is complained of before justices under 24 & 25 Vict. c. 100, and the complaint has been dismissed either for want of proof, or on the ground that the assault or battery was "justified or so trifling as not to merit any punishment," or the defendant has been convicted and paid the fine or suffered the sentence, as the case may be, no further proceedings either civil or criminal can be taken in respect of the same assault (*y*).

II.—*False Imprisonment.*

False imprisonment.

Freedom of the person includes immunity not only from the actual application of force, but from every kind of detention and restraint not authorized by law. The infliction of such restraint is the wrong or false imprisonment; which though generally coupled with assault, is nevertheless a distinct wrong. Laying on of hands or other actual constraint of the body is not [* 189] a necessary *element; and, if "stone walls do not a prison make" for the hero or the poet, the law none the less takes notice that there may be an effectual imprisonment without walls of any kind. "Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets" (*z*). And when a man is lawfully in a house, it is imprisonment to prevent him from leaving the room in which he is (*a*). The detainer, however, must be such as to limit the party's freedom of motion in all directions. It is not an imprisoment to obstruct a man's passage in one direction only. "A prison may have its boundary large or narrow, invisible or tangible, actual or real, or indeed in conception only; it may in itself be moveable or fixed; but a boundary it must

(*y*) 24 & 25 Vict. c. 100, ss. 42—45; Masper *v.* Brown (1876) 1 C. P. D. 97, decides that the Act is not confined to suit strictly for the same cause of action, but extends to bar actions by a husband or master for consequential damage: the words of the Act are "same cause," but they are equivalent to "same assault" in the earlier Act, 16 & 17 Vict. c. 30, s. 1, repealed by 24 & 25 Vict. c. 95.

(*z*) Blackst. Comm. iii. 127.

(*a*) Warner *v.* Riddiford, 4 C. B. N. S. 180; even if he is disabled by sickness from moving at all: the assumption of control is the main thing: Grainger *v.* Hill (1838) 4 Bing. N. C. 212.

have, and from that boundary the party imprisoned must be prevented from escaping; he must be prevented from leaving that place within the limit of which the party imprisoned could be confined." Otherwise every obstruction of the exercise of a right of way may be treated as an imprisonment (*b*). A man is not imprisoned who has an escape open to him (*c*); that is, we apprehend, a means of escape which a man of ordinary ability can use without peril of life or limb. The verge of a cliff, or the foot of an apparently impracticable wall of rock, would in law be a sufficient boundary, though peradventure not sufficient in fact to restrain an expert diver or mountaineer. So much as to what amounts to an imprisonment.

Justification of arrest and imprisonment.

* When an action for false imprisonment is [* 190] brought and defended, the real question in dispute is mostly, though not always, whether the imprisonment was justified. One could not account for all possible justifications except by a full enumeration of all the causes for which one man may lawfully put constraint on the person of another: an undertaking not within our purpose in this work. We have considered, under the head of General Exceptions (*d*), the principles on which persons acting in the exercise of special duties and authorities are entitled to absolute or qualified immunity. With regard to the lawfulness of arrest and imprisonment in particular, there are divers and somewhat minute distinctions between the powers of a peace-officer and those of a private citizen (*e*) : of which the chief is that an officer may without a warrant arrest on reasonable suspicion of felony, even though a felony has not in fact been committed, whereas a private person so arresting, or causing to be arrested, an alleged offender, must show not only that he had reasonable grounds of suspicion but that a felony had actually been committed (*f*). The modern policeman is a sta-

(*b*) Bird *v.* Jones (1845) 7 Q. B. 742; 15 L. J. Q. B. 82, per Coleridge J.

(*c*) Williams J., *ib.* To the same effect Patteson J.: "Imprisonment is a total restraint of liberty of person." Lord Denman C. J. dissented.

(*d*) Ch. IV. p. 92, above.

(*e*) Stephen, Dig. Crim. Proc. c. 12; 1 Hist. Cr. Law 193. and see Hogg *v.* Ward (1858) 3 H. & N. 417; 27 L. J. Ex. 443.

(*f*) This applies only to felony : "the law [*i. e.*, common law] does not excuse constables for arresting persons on the reasonable belief that they have committed a misdemeanour :" see Griffin *v.* Coleman (1859) 4 H. & N. 265; 28 L. J. Ex. 134.

tutory constable having all the powers which a constable has by the common law (*g*), and special statutory powers for dealing with various particular offences (*h*).

Who is answerable.

Every one is answerable for specifically directing the [* 191] *arrest or imprisonment of another, as for any other act that he specifically commands or ratifies; and a superior officer who finds a person taken into custody by a constable under his orders, and then continues the custody, is liable to an action if the original arrest was unlawful (*i*). Nor does it matter whether he acts in his own interest or another's (*k*). But one is not answerable for acts done upon his information or suggestion by an officer of the law, if they are done not as merely ministerial acts, but in the exercise of the officer's proper authority or discretion. Rather troublesome doubts may arise in particular cases as to the quality of the act complained of, whether in this sense discretionary, or ministerial only. The distinction between a servant and an "independent contractor" (*l*) with regard to the employer's responsibility is in some measure analogous. A party who sets the law in motion without making its act his own is not necessarily free from liability. He may be liable for malicious prosecution (of which hereafter); but he cannot be sued for false imprisonment, or in a court which has not jurisdiction over cases of malicious prosecution. "The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and the judgment of a judicial [* 192] officer are interposed between the * charge and the imprisonment" (*m*). Where an officer has

(*g*) Stephen. 1 Hist. Cr. Law, 197, 199. As to the common law powers of constables and others to arrest for preservation of the peace, which seem not free from doubt, see Timothy *v.* Simpson (1835) 1 C. M. & R. 757; Bigelow L. C. 257, per Parke B.

(*h*) *Ibid.* 200.

(*i*) Griffin *v.* Coleman, *supra.*

(*k*) Barker *v.* Braham (1773) 2 W. Bl. 866 (attorney suing out and procuring execution of void process).

(*l*) P. 69, above.

(*m*) Willes J., Austin *v.* Dowling (1870) L. R. 5 C. P. at p. 540; West *v.* Smallwood (1838) 3 M. & W. 418; Bigelow L. C. 237; nor does an action for malicious prosecution lie where the

taken a supposed offender into custody of his own motion, a person who at his request signs the charge-sheet does not thereby make the act his own (*n*), any more than one who certifies work done under a contract thereby makes the contractor his servant. But where an officer consents to take a person into custody only upon a charge being distinctly made by the complainant, and the charge-sheet signed by him, there the person signing the charge-sheet must answer for the imprisonment as well as the officer (*o*).

Again, where a man is given into custody on a mistaken charge, and then brought before a magistrate who remands him, damages can be given against the prosecutor in an action for false imprisonment only for the trespass in arresting, not for the remand, which is the act of the magistrate (*p*).

Reasonable and probable cause.

What is reasonable cause of suspicion to justify arrest is—paradoxical as the statement may look—neither a question of law nor of fact. Not of fact, because it is for the judge and not for the jury (*q*); not of law, because "no definite rule can be laid down for the exercise of the judge's judgment" (*r*). It is a matter of judicial discretion, * such as is familiar enough [* 193] in the classes of cases which are disposed of by a judge sitting alone; but this sort of discretion does not find a natural place in a system which assigns the decision of facts to the jury and the determination of the law to the judge. The anomalous character of the rule has been more than once pointed out and regretted by the highest judicial authority (*s*). But it is too well settled

judicial officer has held on a true statement of the facts that there is reasonable cause: Hope *v.* Evered (1886), 17 Q. B. D. 338.

(*n*) Grinham *v.* Willey (1859) 4 H. & N. 496; 28 L. J. Ex. 242.

(*o*) Austin *v.* Dowling (1870) L. R. 5 C. P. 530. Other illustrations may be found in Addison on Torts, 5th ed. 130, 131. As to the protection of parties issuing an execution in regular course, though the judgment is afterwards set aside on other grounds, see Smith *v.* Sydney (1870) L. R. 5 Q. B. 203. One case often cited, Flewster *v.* Royle (1808, Lord Ellenborough) 1 Camp. 187, is of doubtful authority: see Gosden *v.* Elphick (1849) 4 Ex. 445; 19 L. J. Ex. 9; and Grinham *v.* Willey, above.

(*p*) Lock *v.* Ashton (1848) 12 Q. B. 871; 18 L. J. Q. B. 76.

(*q*) Hailes *v.* Marks (1861) 7 H. & N. 56; 30 L. J. Ex. 389.

(*r*) Lister *v.* Perryman (1870) L. R. 4 H. L. 521, 535, per Lord Chelmsford. So per Lord Colonsay at p. 450.

(*s*) Lord Campbell in Broughton *v.* Jackson (1852) 18 Q. B. 378, 383; 21 L. J. Q. B. 266, Lord Hatherley, Lord Westbury, and Lord Colonsay (all familiar with procedure in which there was no jury at all) in Lister *v.* Perryman, L. R. 4 H. L. 531, 538, 539.

to be disturbed unless by legislation. The only thing which can be certainly affirmed in general terms about the meaning of "reasonable cause" in this connexion is that on the one hand a belief honestly entertained is not of itself enough (*t*); on the other hand, a man is not bound to wait until he is in possession of such evidence as would be admissible and sufficient for prosecuting the offence to conviction, or even of the best evidence which he might obtain by further inquiry. "It does not follow that because it would be very reasonable to make further inquiry, it is not reasonable to act without doing so" (*u*). It is obvious, also, that the existence or non-existence of reasonable cause must be judged, not by the event, but by the party's means of knowledge at the time.

[* 194] * III.—*Injuries in Family Relations.*

Protection of personal relations.

Next to the sanctity of the person comes that of the personal relations constituting the family. Depriving a husband of the society of his wife, a parent of the companionship and confidence of his children, is not less a personal injury, though a less tangible one, than beating or imprisonment. The same may to some extent be said of the relation of master and servant, which in modern law is created by contract, but is still regarded for some purposes as belonging to the permanent organism of the family, and having the nature of status. It seems natural enough that an action should lie at the suit of the head of a household for enticing away a person who is under his lawful authority, be it wife, child, or servant; there may be difficulty in fixing the boundary where the sphere of domestic relations ends and that of pure contract begins, but that is a difficulty of degree. That the same rule should extend to any wrong done to a wife, child, or servant, and followed as a proximate consequence by loss of their society or service, is equally to be expected. Then, if seduction in its ordinary sense of physical and moral corruption is part of the wrong-doer's conduct, it is quite in accordance with principles admitted in other parts of the law that this should be a recognized ground

(*t*) Broughton *v.* Jackson (1852) 18 Q. B. 378; 21 L. J. Q. B. 266; the defendant must show "facts which would create a reasonable suspicion in the mind of a reasonable man," per Lord Campbell C. J.

(*u*) Bramwell B., Perryman *v.* Lister (1868) L. R. 3. Ex. at p. 202, approved by Lord Hatherley, *S. C.* nom. Lister *v.* Perryman, L. R. 4 H. L. at p. 533.

for awarding exemplary damages. It is equally plain that on general principle a daughter or servant can herself have no civil remedy against the seducer, though the parent or master may; no civil remedy, we say, for other remedies have existed and exist. She cannot complain of that which took place by her own consent. Any different rule would be an anomaly; positive legislation might introduce it on grounds of moral expediency; the courts, which have the power and the duty of applying known principles to * new cases, [* 195] but cannot abrogate or modify the principles themselves, are unable to take any such step.

Historical accidents of the common law herein.

There seems, in short, no reason why this class of wrongs should not be treated by the common law in a fairly simple and rational manner, and with results generally not much unlike those we actually find, only free from the anomalies and injustice which flow from disguising real analogies under transparent but cumbrous fictions. But as matter of history (and pretty modern history) the development of the law has been strangely halting and one-sided. Starting from the particular case of a hired servant, the authorities have dealt with other relations, not by openly treating them as analogous in principle, but by importing into them the fiction of actual service; with the result that in the class of cases most prominent in modern practice, namely, actions brought by a parent (or person *in loco parentis*) for the seduction of a daughter, the test of the plaintiff's right has come to be, not whether he has been injured as the head of a family, but whether he can make out a constructive "loss of service" (*v*).

Trespass for taking away wife, &c. and *per quod servitium amisit.*

The common law provided a remedy by writ of trespass for the actual taking away of a wife, servant, or heir, and perhaps younger child also (*x*). An action of trespass also lay for wrongs done to the plaintiff's wife or servant (not to a child as such), whereby he lost the society of the former or the services of the latter. The language of * pleading was *per* [* 196] *quod consortium*, or *servitium, amisit.* Such a cause of action was quite distinct from that which the husband

(*v*) Christian's note on Blackstone iii. 142 is still not amiss, though the amendments of this century in the law of evidence have removed some of the grievances it notes.

(*x*) F. N. B. 89 O, 90 H, 91 I; Blackst. Comm. iii. 139. The writ was *de uxore abducta cum bonis viri sui*, or an ordinary writ of trespass (F. N. B. 52 K); a case as late as the Restoration is mentioned in Bac. Abr. v. 328 (ed. 1832).

might acquire in right of the wife, or the servant in his own right. The trespass is one, but the remedies are "diversis respectibus" (*y*). "If my servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself for every small battery shall have an action; and the reason of this difference is that the master has not any damage by the personal beating of his servant, but by reason of a *per quod*, viz., *per quod servitium, &c. amisit;* so that the original act is not the cause of his action, but the consequent upon it, *viz.*, the loss of his service is the cause of his action; for be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action" (*z*). The same rule applies to the beating or maltreatment of a man's wife, provided it be "very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife" (*a*).

"Criminal conversation.

Against an adulterer the husband had an action at common law, commonly known as an action of criminal conversation. In form it was generally trespass *vi et armis*, on the theory that "a wife is not, as regards her husband, a free agent or separate person" (*b*), and [* 197] therefore her * consent was immaterial, and the husband might sue the adulterer as he might have sued any mere trespasser who beat, imprisoned, or carried away his wife against her will. Actions for criminal conversation were abolished in England on the establishment of the Divorce Court in 1857, but damages can be claimed on the same principles in proceedings for a dissolution of marriage or judicial separation (*c*).

In practice these actions were always or almost always instituted with a view of obtaining a divorce by private Act of Parliament; the rules of the House of Lords (in which alone such bills were brought in) re-

(*y*) Y. B. 19 Hen. VI. 45 pl. 94.

(*z*) Robert Marys's case, 9 Co. Rep. 113 *a*. It is held in Osborn *v.* Gillett (1873) L. R. 8 Ex. 88, that a master shall not have an action for a trespass whereby his servant is killed (*diss.* Bramwell B.). It is submitted that the decision is wrong, and Lord Bramwell's dissenting judgment right. See pp. 54, 55, above.

(*a*) Blackst. Comm. iii. 140.

(*b*) Coleridge J. in Lumley *v.* Gye (1853) 22 L. J. Q. B. at p. 478. Case would also lie, and the common form of declaration was for some time considered to be rather case than trespass; Macfadzen *v.* Olivant (1805) 6 East 387. See next note but one.

(*c*) 20 & 21 Vict. c. 85, ss. 33, 59.

quiring the applicant to have obtained both the verdict of a jury in an action, and a sentence of separation *a mensa et toro* in the Ecclesiastical Court.

Enticing away servants.

An action also lay for enticing away a servant (that is, procuring him or her to depart voluntarily from the master's service), and also for knowingly harbouring a servant during breach of service; whether by the common law, or only after and by virtue of the Statute of Labourers (*d*), is doubtful. Quite modern examples are not wanting (*e*).

* Much later the experiment was tried with [* 198] success of a husband bringing a like action "against such as persuade and entice the wife to live separate from him without a sufficient cause" (*f*).

Still later the action for enticing away a servant, *per quod servitium amisit*, was turned to the purpose for which alone it may now be said to survive, that of punishing seducers; for the latitude allowed in estimating damages makes the proceeding in substance almost a penal one.

Actions for seduction in modern practice:

In this kind of action it is not necessary to prove the existence of a binding contract of service between the plaintiff and the person seduced or enticed away. The presence or absence of seduction in the common sense

(*d*) 23 Edw. 3 (A. D. 1349): this statute, passed in consequence of the Black Death, marks a great crisis in the history of English agriculture and land tenure. As to its bearing on the matter in hand, see the dissenting judgment of Coleridge J. in Lumley *v.* Gye (1853) 2 E. & B. 216; 22 L. J. Q. B. 463, 480. The action was generally on the case, but it might be trespass: *e. g.*, Tullidge *v.* Wade (1769) 3 Wils. 18, an action for seducing the plaintiff's daughter, where the declaration was in trespass *vi et armis*. How this can be accounted for on principle I know not, short of regarding the servant as a *quasi* chattel: the difficulty was felt by Sir James Mansfield, Woodward *v.* Walton (1807) 2 B. & P. N. R. 476,482. For a time it seemed the better opinion, however, that trespass was the only proper form: *ibid.*, Ditcham *v.* Bond (1814) 2 M. & S. 436. It was formally decided as late as 1839 (without giving any other reason than the constant practice) that trespass or case might be used at the pleader's option: Chamberlain *v.* Hazelwood (1839) 5 M. & W. 515; 9 L. J. Ex. 87. The only conclusion which can or need at this day be drawn from such fluctuations is that the old system of pleading did not succeed in its professed object of maintaining clear logical distinctions between different causes of action.

(*e*) Hartley *v.* Cummings (1847) 5 C. B. 247; 17 L. J. C. P. 84.

(*f*) Blackst. Comm. iii. 139; Winsmore *v.* Greenbank (1745) Willes 577; Bigelow L. C. 328. It was objected that there was no precedent of any such action.

proof or presumption of service.

(whether the defendant "debauched the plaintiff's daughter," in the forensic phrase) makes no difference in this respect; it is not a necessary part of the cause of action, but only a circumstance of aggravation (*f*). Whether that element be present or absent, proof of a *de facto* relation of service is enough; and any fraud whereby the servant is induced to absent himself or herself affords a ground of action, "when once the relation of master and servant at the time of the acts complained of is established" (*g*).

[* 199] * This applies even to an actual contract of hiring made by the defendant with a female servant whom he has seduced, if it is found as a fact that the hiring was a merely colourable one, undertaken with a view to the seduction which followed (*h*). And a *de facto* service is not the less recognized because a third party may have a paramount claim: a married woman living apart from her husband in her father's house may be her father's servant, even though that relation might be determined at the will of the husband (*i*). Some evidence of such a relation there must be, but very little will serve. A grown-up daughter keeping a separate establishment cannot be deemed her father's servant (*k*); nor can a daughter, whether of full age or not, who at the time of the seduction is actually another person's servant, so that no part of her services is at her parents' disposal (*l*). On the other hand, the fact of a child living with a parent, or any other person *in loco parentis*, as a member of the family of which that

(*f*) Evans *v.* Walton (1867) L. R. 2 C. P. 615, where it was unsuccessfully contended that the action for seducing a daughter with loss of service as the consequence, and for enticing away a servant, were distinct species; and that to sustain an action for "enticing away" alone, a binding contract of service must be proved.

(*g*) Willes J. L. R. 2 C. P. 622.

(*h*) Speight *v.* Oliviera (1819) 2 Stark. 493, cited with approval by Montague Smith J., L. R. 2 C. P. 624.

(*i*) Harper *v.* Luffkin (1827) 7 B. & C. 387. This was long before courts of law did or could recognize any capacity of contracting in a married woman.

(*k*) Manley *v.* Field (1859) 7 C. B. N. S. 96; 29 L. J. C. P. 79.

(*l*) Dean *v.* Peel (1804) 5 East 45; even if by the master's licence she gives occasional help in her parents' work; Thompson *v.* Ross (1859) 5 H. & N. 16; 29 L. J. Ex. 1; Hedges *v.* Tagg (1872) L. R. 7 Ex. 283. In the United States it is generally held that actual service with a third person is no bar to the action, unless there is a binding contract which excludes the parents' right of reclaiming the child's services—*i.e.* that service either *de facto* or *de jure* will do: Martin *v.* Payne (Sup. Court N. Y. 1812), Biglow L. C. 286, and notes.

person is the head, is deemed enough to support the inference "that the relation of master and servant, determinable at the will of either party, exists between them" (*m*). * And a daughter under age, [* 200] returning home from service with another person which has been determined, may be deemed to have re-entered the service of her father (*n*). "The right to the service is sufficient" (*o*).

Partial attendance in the parent's house is enough to constitute service, as where a daughter employed elsewhere in the daytime is without consulting her employer free to assist, and does assist, in the household when she comes home in the evening (*p*).

Damages.

Some loss of service, or possibility of service, must be shown as consequent on the seduction, since that is, in theory, the ground of action (*q*); but when that condition is once satisfied, the damages that may be given are by no means limited to an amount commensurate with the actual loss of service proved or inferred. The awarding of exemplary damages is indeed rather encouraged than otherwise (*r*). It is immaterial whether the plaintiff be a parent or kinsman, or a stranger in blood who has adopted the person seduced (*s*).

Services of young child.

On the same principle or fiction of law a parent can sue in his own name for an injury done to a child living under his care and control, provided the child is old enough to be capable of rendering service; otherwise not, for "the gist of the action depends upon the capacity of the child to perform acts of service" (*t*).

Capricious operation of the law.

* The capricious working of the action for [* 201] seduction in modern practice has often been the sub-

(*m*) Bramwell B. in Thompson *v.* Ross, last note.

(*n*) Terry *v.* Hutchinson (1868) L. R. 3 Q. B. 599.

(*o*) Littledale J. cited with approval by Blackburn J., L. R. 3 Q. B. 602.

(*p*) Rist *v.* Faux (1863), Ex. Ch. 4 B. & S. 409; 32 L. J. Q. B. 386.

(*q*) Grinnell *v.* Wells (1844) 7 M. & G. 1033; 14 L. J. C. P. 19; Eager *v.* Grimwood (1847) 1 Ex. 61; 16 L. J. Ex. 236, where the declaration was framed in trespass, it would seem purposely on the chance of the court holding that the *per quod servitium amisit* could be dispensed with.

(*r*) See Terry *v.* Hutchinson, *supra*.

(*s*) Irwin *v.* Dearman (1809) 11 East 23.

(*t*) Hall *v.* Hollander (1825) 4 B. & C. 660. But this case does not show that, if a jury chose to find that a very young child was capable of service, their verdict would be disturbed.

ject of censure. Thus, Serjeant Manning wrote forty years ago: "the *quasi* fiction of *servitium amisit* affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn her bread amongst strangers" (*u*). All devices for obtaining what is virtually a new remedy by straining old forms and ideas beyond their original intention are liable to this kind of inconvenience. It has been truly said (*v*) that the enforcement of a substantially just claim "ought not to depend upon a mere fiction over which the courts possess no control." We have already pointed out the bolder course which might have been taken without doing violence to any legal principle. Now it is too late to go back upon the cases, and legislation would also be difficult and troublesome, not so much from the nature of the subject in itself as from the variety of irrelevant matters that would probably be imported into any discussion of it at large.

Constructive service in early cases.

It would be merely curious, and hardly profitable in any just proportion to the labour, to inquire how far the fiction of constructive service is borne out by the old law of the action for beating or carrying away a servant. Early in the 15th century we find a dictum that if a man serves me, and stays with me at his own will, I shall have an action for beating him, on the ground of the loss of his service (*x*): but this is re- [* 202] ported with a *quaere*. A generation * later (*y*) we find Newton C. J. saying that a relation of service between father and son cannot be presumed: "for he may serve where it pleaseth him, and I cannot constrain him to serve without his goodwill:" this must apply only to a son of full age, but as to that case Newton's opinion is express that some positive evidence of service, beyond living with the parent as a member of the household, is required to support an action. Unless the case of a daughter can be distinguished, the modern authorities do not agree with this. But the same Year Book bears them out (as noted by Willes J.) (*z*) in holding that a binding contract of service need not be shown. Indeed, it was better merely to allege the service as a fact (*in servitio suo existentem cepit*),

(*u*) Note to Grinnell *v.* Wells, 7 M. & G. 1044.
(*v*) Starkie's note to Speight *v.* Oliviera (1819) 2 Stark. 496.
(*x*) 11 Hen. IV. fo. 1—2, pl. 2, per Huls J. (A.D. 1410).
(*y*) 22 Hen. VI. 31 (A.D. 1443).
(*z*) L. R. 2 C. P. 621-2.

for an action under the Statute of Labourers would not lie where there was a special contract varying from the retainer contemplated by the statute, and amounting to matter of covenant (*a*).

Intimidation of servants and tenants.

A similar cause of action, but not quite the same, was recognized by the mediæval common law where a man's servants or tenants at will (*b*) were compelled by force or menace to depart from their service or tenure. "There is another writ of trespass," writes Fitzherbert, "against those who lie near the plaintiff's house, and will not suffer his servants to go into the house, nor the servants who are in the house to come out thereof" (*c*). Examples of this kind are not uncommon down to the sixteenth century or even later: we find in the pleadings considerable variety of circumstance, * which may be taken as expansion or [* 203] specification of the *alia enormia* regularly mentioned in the conclusion of the writ (*d*).

In the early years of the eighteenth century the genius of Holt found the way to use this, together with other special classes of authorities, as a foundation for the broader principle that "he that hinders another in his trade or livelihood is liable to an action for so hindering him" (*e*), subject, of course, to the excep-

(*a*) 22 Hen. VI. 32 *b*, per Cur. (Newton C. J.; Fulthorpe, Ascue or Ayscoghe, Portington JJ.); F. N. B. 168 F.

(*b*) If the tenancy were not at will, the departure would be a breach of contract; this introduces a new element of difficulty, never expressly faced by our courts before Lumley *v.* Gye, of which more elsewhere.

(*c*) F. N. B. 87 N.; and see the form of the writ there.

(*d*) 14 Ed. IV. 7, pl. 13, a writ "quare tenentes suos verberavit per quod a tenura sua recesserunt"; 9 Hen. VII. 7, pl. 4, action for menacing plaintiff's tenants at will "de vita et mutilatione membrorum, ita quod recesserunt de tenura;" Rastell, Entries 661, 662, similar forms of declaration; one (pl. 9) is for menacing the king's tenants so that "negotia sua palam incedere non audebant"; Garret *v.* Taylor, Cro. Jac. 567, action on the case for threatening the plaintiff's workmen *and customers*, "to mayhem and vex them with suits if they bought any stones"; 21 Hen. VI. 26, pl. 9, "manassavit vulneravit et verberavit": note that in this action the "vulneravit" is not justifiable and therefore must be traversed, otherwise under a plea of *non assault demesne;* 22 Ass. 102, pl. 76, is for actual beating, aggravated by carrying away timber of the plaintiff's (*merimentum* = *materiamen*, see Du Cange, s. v. *materia;* a Latin *macremium* and a law-French *meresme* are also found). Cp. Reg. Brev. (1595) 104 *a*, "quando tenentes non audent morari super tenuris suis" and Tarleton *v.* McGawley (1794) Peake 270 [205], action for deterring negroes on the coast of Africa from trading with plaintiff's ship.

(*e*) Keeble *v.* Hickeringill (1705) 11 East 574 *n.*

tion that no wrong is done by pursuing one's own trade or livelihood in the accustomed manner though loss to another may be the result (*f*). Historically both this principle and that of Lumley *v.* Gye (*g*) are developments of the old "per quod servitium amisit;" but in the modern law they depend on different and much wider reasons, and raise questions which are not technical but fundamental. We shall therefore deal with them not here but under another head.

(*f*) *Ib.* 576; *supra*, p. 129.
(*g*) 2 E. & B. 216; 22 L. J. Q. B. 463 (1853).

* CHAPTER VII. [* 204]

DEFAMATION.

Civil and criminal jurisdiction distinguished.

REPUTATION and honour are no less precious to good men than bodily safety and freedom. In some cases they may be dearer than life itself. Thus it is needful for the peace and well-being of a civilized commonwealth that the law should protect the reputation as well as the person of the citizen. In our law some kinds of defamation are the subject of criminal proceedings, as endangering public order, or being offensive to public decency or morality. We are not here concerned with libel as a criminal offence, but only with the civil wrong and the right to redress in a civil action: and we may therefore leave aside all questions exclusively proper to the criminal law and procedure, some of which are of great difficulty (*a*).

Slander and libel distinguished.

The wrong of defamation may be committed either by way of speech, or by way of writing or its equivalent. For this purpose it may be taken that significant gestures (as the finger-language of the deaf and dumb) are in the same case with audible words; and there is no doubt that printing, engraving, drawing, and every other use of permanent visible symbols to convey distinct ideas, are in the same case with writing. The term slander is appropriated to the former kind of utterances, libel to the latter. Using * the [* 205] terms "written" and "spoken" in an extended sense, to include the analogous cases just mentioned, we may say that slander is a spoken and libel is a written defamation. The law has made a great difference between the two. Libel is an offence as well as a wrong, but slander is a civil wrong only (*b*). Written utterances are, in the absence of special ground of justification or excuse, wrongful as against any person whom they tend to bring into hatred, contempt, or ridicule.

(*a*) Such as the definition of blasphemous libel, and the grounds on which it is punishable.

(*b*) *Scandalum magnatum* was, and in strictness of law still might be, an exception to this: Blake Odgers, Digest of the Law of Libel and Slander, 133—136. Mr. Odgers has not found any case after 1710

Spoken words are actionable only when special damage can be proved to have been their proximate consequence, or when they convey imputations of certain kinds.

No branch of the law has been more fertile of litigation than this (whether plaintiffs be more moved by a keen sense of honour, or by the delight of carrying on personal controversies under the protection and with the solemnities of civil justice), nor has any been more perplexed with minute and barren distinctions. This latter remark applies especially to the law of slander; for the law of libel, as a civil cause of action, is indeed overgrown with a great mass of detail, but is in the main sufficiently rational. In a work like the present it is not possible to give more than an outline of the subject. Those who desire full information will find it in Mr. Blake Odgers' excellent and exhaustive monograph (*c*). We shall, as a rule confine our authorities and illlustrations to recent cases.

[* 206] * 1.—*Slander.*

When slander is actionable.

Slander is an actionable wrong when special damage can be shown to have followed from the utterance of the words complained of, and also in the following cases:

Where the words impute a criminal offence.

Where they impute having a contagious disease which would cause the person having it to be excluded from society.

Where they convey a charge of unfitness, dishonesty, or incompetence in an office, profession or trade, in short, where they manifestly tend to prejudice a man in his calling.

Spoken words which afford a cause of action without proof of special damage are said to be actionable *per se:* the theory being that their tendency to injure the plaintiff's reputation is so manifest that the law does not require evidence of their having actually injured it. There is much cause however to deem this and other like reasons given in our modern books mere after-

(*c*) A Digest of the Law of Libel and Slander, &c. By W. Blake Odgers, London, 1881. Part IV. of Mr. Shortt's "Law relating to works of Literature and Art" (2nd ed. London, 1884), may also be usefully consulted: but this does not cover the whole ground.

thoughts, devised to justify the results of historical accident: a thing so common in current expositions of English law that we need not dwell upon this example of it (*d*).

Meaning of "*prima facie* libellous."

No such distinctions exist in the case of libel: it is enough to make a written statement *prima facie* libellous that it is injurious to the character or credit (domestic, public, or professional) of the person concerning whom it * is uttered, or in any way tends [* 207] to cause men to shun his society, or to bring him into hatred or contempt, or ridicule. When we call a statement *prima facie* libellous, we do not mean that the person making it is necessarily a wrong-doer, but that he will be so held unless the statement is found to be within some recognized ground of justification and excuse.

Such are the rules as to the actionable quality of words, if that be a correct expression. The authorities by which they are illustrated, and on which they ultimately rest, are to a great extent antiquated or trivial (*e*); the rules themselves are well settled in modern practice.

Special damage.

Where "special damage" is the ground of action, we have to do with principles already considered in a former chapter (*f*): namely, the damage must be in a legal sense the natural and probable result of the words complained of. It has been said that it must also be "the legal and natural consequence of the words spoken" in this sense, that if A. speaks words in disparagement of B. which are not actionable *per se*, by reason of which speech C. does something to B.'s disadvantage that is itself wrongful as against B. (such as dismissing B. from his service in breach of a subsisting contract), B. has no remedy against A., but only against C. (*g*). But this doctrine is contrary to prin-

(*d*) See Blake Odgers, pp. 3—5. I am disposed to agree with Mr. Starkie's opinion there cited. And see 6 Amer. Law Rev. 593. It seems odd that the law should presume damage to a man from printed matter in a newspaper which it may be, none of his acquaintances are likely to read, and refuse to presume it from the direct oral communication of the same matter to the persons most likely to act upon it.

(*e*) The old abridgments, *e. g.* Rolle, sub tit. Action sur Case, Pur Parolls, abound in examples, many of them sufficiently grotesque. A select group of cases is reported by Coke, 4 Rep. 12 *b*—20 *b*.

(*f*) P. 28, above.

(*g*) Vicars *v.* Wilcocks (1806) 8 East 1.

The question is whether there was special damage.

ciple: the question is not whether C.'s act was lawful or unlawful, but whether it might have been in fact reasonably expected to result from the original act of A. And, though not directly overruled, it has been disapproved by so much and such weighty authority that [* 208] we may say * it is not law (*h*). There is authority for the proposition that where spoken words, defamatory but not actionable in themselves, are followed by special damage, the cause of action is not the original speaking, but the damage itself (*i*). This does not seem to affect the general test of liability. Either way the speaker will be liable if the damage is an intended or natural consequence of his words, otherwise not.

Repetition of spoken words.

It is settled however that no cause of action is afforded by special damage arising merely from the voluntary repetition of spoken words by some hearer who was not under a legal or moral duty to repeat them. Such a consequence is deemed too remote (*j*). But if the first speaker authorized the repetition of what he said, or (it seems) spoke to or in the hearing of some one who in the performance of a legal, official, or moral duty ought to repeat it, he will be liable for the consequences (*k*).

Special damage involves a definite temporal loss.

Losing the general good opinion of one's neighbours, *consortium vicinorum* as the phrase goes, is not of itself special damage. A loss of some material advantage must be shown. Defamatory words not actionable *per se* were spoken of a member of a religious society who by reason thereof was excluded from membership; there was not any allegation or proof that such membership carried with it as of right any definite [* 209] temporal advantage. It was * held that no loss appeared beyond that of *consortium vicinorum*, and therefore there was no ground of action (*l*). Yet the loss of *consortium* as between husband and wife is

(*h*) Lynch *v.* Knight (1861) 9 H. L. C. 577. See notes to Vicars *v.* Wilcocks, in 2 Sm. L. C.

(*i*) Maule J. *ex relat.* Bramwell L. J., 7 Q. B. D. 437.

(*j*) Parkins *v.* Scott (1862) 1 H. & C. 153; 31 L. J. Ex. 331 (wife repeated to her husband gross language used to herself, wherefore the husband was so much hurt that he left her).

(*k*) Blake Odgers 332. Riding *v.* Smith (1876) 1 Ex. D. 91, must be taken not to interfere with this distinction, as the majority of the court disclaimed any intention of so doing: but see thereon Mayne on Damages, 4th ed. 27.

(*l*) Roberts *v.* Roberts (1864) 5 B. & S. 384; 33 L. J. Q. B. 249.

a special damage of which the law will take notice (*m*), and so is the loss of the voluntary hospitality of friends, this last on the ground that a dinner in a friend's house and at his expense is a thing of some temporal value (*n*). Actual membership of a club is perhaps a thing of temporal value for this purpose, but the mere chance of being elected is not: so that an action will not lie for speaking disparaging words of a candidate for a club, by means whereof the majority of the club decline to alter the rules in a manner which would be favourable to his election. "The risk of temporal loss is not the same as temporal loss" (*o*). Trouble of mind caused by defamatory words is not sufficient special damage, and illness consequent upon such trouble is too remote. "Bodily pain or suffering cannot be said to be the natural result in all persons" (*p*).

Imputations of criminal offence.

As to the several classes of spoken words that may be actionable without special damage: words sued on as imputing crime must amount to a charge of some offence which, if proved against the party to whom it is imputed, would expose him to imprisonment or other corporal penalty (not merely to a fine in the first instance, with possible imprisonment in default of payment) (*q*). The * offence need not be specified with legal precision, indeed it need not be specified at all if the words impute felony generally. But if particulars are given they must be legally consistent with the offence imputed. It is not actionable *per se* to say of a man that he stole the parish bell-ropes when he was churchwarden, for the legal property is vested in him *ex officio* (*r*); it might be otherwise to say that he fraudulently converted them to his own use. The [* 210]

(*m*) Lynch *v.* Knight, 9 H. L. C. 577.

(*n*) Davies *v.* Solomon (1871) L. R. 7 Q. B. 112.

(*o*) Chamberlain *v.* Boyd (1883) 11 Q. B. Div. 407; per Bowen L. J. at p. 416. The damage was also held too remote.

(*p*) Allsop *v.* Allsop (1860) 5 H. & N. 534; 29 L. J. Ex. 315.

(*q*) This is the true distinction: it matters not whether the offence be indictable or punishable by a court of summary jurisdiction: Webb *v.* Beavan (1883) 11 Q. B. D. 609. In the United States the received opinion is that such words are actionable only "in case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment:" Brooker *v.* Coffin (1809) 5 Johns. 188; Bigelow L. C. 77, 80; later authorities *ap.* Cooley on Torts, 197.

(*r*) Jackson *v.* Adams (1835) 2 Bing. N. C. 402. The words were, "who stole the parish bell-ropes, you scamping rascal?" If spoken while the plaintiff held the office, they would probably have been actionable, as tending to his prejudice therein.

practical inference seems to be that minute and copious vituperation is safer than terms of general reproach, such as "thief," inasmuch as a layman who enters on details will probably make some impossible combination.

Charges of mere immorality not actionable.

False accusation of immorality or disreputable conduct not punishable by a temporal court is not actionable *per se*, however gross. The courts might without violence have presumed that a man's reputation for courage, honour, and truthfulness, a woman's for chastity and modest conduct, was something of which the loss would naturally lead to damage in any lawful walk of life. But the rule is otherwise, and we can only say with Lord Blackburn that "the law upon the subject of disparaging words spoken of other persons is not in a satisfactory state" (*s*). It has gone wrong from the beginning in making the damage and not the insult the cause of action; and this seems the stranger [* 211] * when we have seen that with regard to assault a sounder principle is well established (*t*).

A person who has committed a felony and been convicted may not be called a felon after he has undergone the sentence, and been discharged, for he is then no longer a felon in law (*u*).

Imputations of contagious disease.

Little need be said concerning imputations of contagious disease unfitting a person for society: that is, in the modern law, venereal disease (*x*). The only notable point is that "charging another with having had a contagious disorder is not actionable; for unless the words spoken impute a continuance of the disorder at the time of speaking them, the gist of the action fails; for such a charge cannot produce the effect which makes it the subject of an action, namely, his being avoided by society" (*y*). There does not seem to be more than one reported English case of the kind within the present century (*z*).

(*s*) 5 B. & S. at p. 390. The technical reason is that charges of incontinence, heresy, &c., were "spiritual defamation," and the matter determinable in the Ecclesiastical Court acting *pro salute animae*. See Davis *v.* Gardiner, 4 Co. Rep. 16 *b*; Palmer *v.* Thorpe, *ib.* 20 *a*.

(*t*) P. 183, above.

(*u*) Leyman *v.* Latimer (1878) 3 Ex. Div. 352.

(*x*) Leprosy and, it is said, the plague, were in the same category. Small-pox is not. See Blake Odgers 63.

(*y*) Carslake *v.* Mapledoram (1788) 2 T. R. 473; Bigelow L. C. 84, per Ashhurst J.

(*z*) Bloodworth *v.* Gray (1844) 7 M. & Gr. 334. The whole of the judgment runs thus: "This case falls within the principle of the old authorities."

Concerning words spoken of a man to his disparagement in his office, profession, or other business: they are actionable on the following conditions:—They must be spoken of him in relation to or "in the way of" a position which he holds, or a business he carries on, at the time of speaking. Whether they have reference to his office or business is, in case of doubt, a question of fact. And they must either amount to a direct charge of incompetence or unfitness, or impute something so inconsistent with competence or fitness that, if believed, it would tend to the loss of the * par- [* 212] ty's employment or business. To call a stonemason a "ringleader of the nine hour system" is not on the face of it against his competence or conduct as a workman, or a natural and probable cause why he should not get work; such words therefore, in default of anything showing more distinctly how they were connected with the plaintiff's occupation, were held not to be actionable (*a*). Spoken charges of habitual immoral conduct against a clergyman or a domestic servant are actionable, as naturally tending, if believed, to the party's deprivation or other ecclesiastical censure in the one case, and dismissal in the other. Of a clerk or messenger, and even of a medical man, it is otherwise, unless the imputation is in some way specifically connected with his occupation. It is actionable to charge a barrister with being a dunce, or being ignorant of the law; but not a justice of the peace, for he need not be learned. It is actionable to charge a solicitor with cheating his clients, but not with cheating other people on occasions unconnected with his business (*b*).

Evil-speaking of a man in the way of his business.

It makes no difference whether the office or profession carries with it any legal right to temporal profit, or in point of law is wholly or to some extent honorary, as in the case of the barrister or a fellow of the College of Physicians. Nor does it matter what the nature of the employment is, provided it be lawful (*c*); or whether the conduct imputed is such as in itself the law will blame or not, provided it is inconsistent with the due fulfilment of what the party, in virtue of his employment or office, has undertaken. A gamekeeper may have an action against one who says of him, as gamekeeper, that he trapped foxes (*d*). As regards the rep-

(*a*) Miller *v.* David (1874) L. R. 9 C. P. 118.
(*b*) Doyley *v.* Roberts (1837) 3 Bing. N. C. 835, and authorities there cited.
(*c*) L. R. 2 Ex. at p. 330.
(*d*) Foulger *v.* Newcomb (1867) L. R. 2 Ex. 327.

[* 213] utation of traders the law * has taken a broader view than elsewhere. To impute insolvency to a tradesman, in any form whatever, is actionable. Substantial damages have been given by a jury, and allowed by the court, for a mere clerical error by which an advertisement of a dissolution of partnership was printed among a list of meetings under the Bankruptcy Act (*e*).

Words indirectly causing damage to a man in his business.

There are cases, though not common in our book, in which a man suffers loss in his business as the intended or "natural and probable result" of words spoken in relation to that business, but not against the man's own character or conduct: as where a wife or servant dwelling at his place of business is charged with misbehaviour, and the credit of the business is thereby impaired. In such a case an action lies, but is not, it seems, properly an action of slander, but rather a special action (on the case in the old system of pleading) analogous to those which have been allowed for disturbing a man in his calling, or in the exercise of a right in other ways. It is doubtful how far the rule that a man is not liable for unauthorized repetition of his spoken words applies to an action of this kind (*f*). On principle the conditions of liability would seem to be that the defendant made the original statement without belief in its truth (for the cause of action is more akin to deceit than to defamation), and that he expected, or had reasonable cause to expect, that it would be repeated in such a manner as in fact it was, and would lead to such damage as in fact ensued.

[* 214] * 2.—*Defamation in general.*

Rules as to defamation generally.

We now pass to the general law of defamation, which applies to both slander and libel, subject, as to slander, to the conditions and distinctions we have just gone through. Considerations of the same kind may affect the measure of damages for written defamation, though not the right of action itself.

"Implied malice."

It is commonly said that defamation to be actionable

(*e*) Blake Odgers 78; Shepheard *v.* Whitaker (1875) L. R. 10 C. P. 502.

(*f*) Riding *v.* Smith (1876) 1 Ex. D. 91; see Mr. Blake Odgers and Mr. J. D. Mayne thereon.

must be malicious, and the old form of pleading added "maliciously" to "falsely." Whatever may have been the origin or the original meaning of this language (*f*), malice in the modern law signifies neither more nor less in this connexion, than the absence of just cause or excuse (*g*); and to say that the law implies malice from the publication of matter calculated to convey an actionable imputation is only to say in an artificial form that the person who so publishes is responsible for the natural consequences of his act (*h*). "Express malice" means something different, of which hereafter.

What is publication.

Evil-speaking, of whatever kind, is not actionable if communicated only to the person spoken of. The cause of action is not insult, but proved or presumed injury to reputation. Therefore there must be a communication by the speaker or writer to at least one third person; and this necessary element of the wrongful act is technically called publication. It need not amount to anything like publication in the common usage of the word. That an open * message passes through the [* 215] hands of a telegraph clerk (*i*), or a manuscript through those of a compositor in a printing-office (*k*), is enough to constitute a publication to those persons if they are capable of understanding the matters so delivered to them. Every repetition of defamatory words is a new publication, and a distinct cause of action. The sale of a copy of a newspaper, published (in the popular sense) many years ago, to a person sent to the newspaper office by the plaintiff on purpose to buy it, is a fresh publication (*l*). It appears on the whole that if the defendant has placed defamatory matter within a person's reach, whether it is likely or not that he will attend to the meaning of it, this throws on the defendant the burden of proving that the paper was not read, or the words

(*f*) See Bigelow L. C. 117.

(*g*) Bayley J. in Bromage *v.* Prosser (1825) 4 B. & C. at p. 253; Bigelow L. C. 137: "Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse:" so too Littledale J. in McPherson *v.* Daniels (1829) 10 B. & C. 272.

(*h*) Lord Blackburn in Capital and Counties Bank *v.* Henty (1882) 7 App. Ca. 787.

(*i*) See Williamson *v.* Freer (1874) L. R. 9 C. P. 393.

(*k*) Printing is for this reason *prima facie* a publication, Baldwin *v.* Elphinston, 2 W. Bl. 1037. There are obvious exceptions, as if the text to be printed is Arabic or Chinese, or the message in cipher.

(*l*) Duke of Brunswick *v.* Harmer (1849) 14 Q. B. 185; 19 L. J. Q. B. 20.

heard by that person; but if it is proved that the matter did not come to his knowledge, there is no publication (*m*). A person who is an unconscious instrument in circulating libellous matter, not knowing or having reason to believe that the document he circulates contains any such matter, is free from liability if he proves his ignorance. Such is the case of a newsvendor, as distinguished from the publishers, printers, and owners of newspapers. "A newspaper is not like a fire; a man may carry it about without being bound to suppose that it is likely to do an injury" (*n*). If A. is justified in making a disparaging communication about B.'s character to C. (as, under certain conditions, we [* 216] * shall see that he may be), it would seem upon the tendency and analogy of the authorities now before us that this will be no excuse if, exchanging the envelopes of two letters by inadvertence, or the like, he does in fact communicate the matter to D. It has been held otherwise (*o*), but we do not think the decision is generally accepted as good law: if it is right on principle, the earlier authorities on "publication" can hardly be right also.

Sending a defamatory letter to a wife about her husband is a publication: "man and wife are in the eye of the law, for many purposes, one person, and for many purposes"—of which this is one—"different persons" (*p*).

Vicarious publication.

On the general principles of liability, a man is deemed to publish that which is published by his authority. And the authority need not be to publish a particular form of words. A general request, or words intended and acted on as such, to take public notice of a matter, may make the speaker answerable for what is published in conformity to the general "sense and substance" of his request (*q*).

Construction of words: *innuendo.*

Supposing the authorship of the words complained of to be proved or admitted, many questions may remain.

(*m*) Blake Odgers 153.

(*n*) Emmens *v.* Pottle (1885) 16 Q. B. Div. 354, per Bowen L. J. at p. 358. But it seems the vendor would be liable if he had reason to know that the publication contained, or was likely to contain, libellous matter.

(*o*) Thompson *v.* Dashwood (1883) 11 Q. B. D. 43.

(*p*) Wenman *v.* Ash (1853) 13 C. B. 836; 22 L. J. C. P. 190, per Maule J.

(*q*) Parkes *v.* Prescott (1869) L. R. 4 Ex. 169, Ex. Ch. Whether the particular publication is within the authority is a question of fact. All the Court decide is that verbal dictation or approval by the principal need not be shown.

The construction of words alleged to be libellous (we shall now use this term as equivalent to "defamatory," unless the context requires us to advert to any distinction between libel and slander) is often a matter of doubt. In the first place the court has to be satisfied that they are capable of the defamatory meaning ascribed to them. * Whether they are so is a [* 217] question of law (*r*). If they are, and if there is some other meaning which they are also capable of, it is a question of fact which meaning they did convey under all the circumstances of the publication in question. An averment by the plaintiff that words not libellous in their ordinary meaning or without a special application were used with a specified libellous meaning or application is called an *innuendo*, from the old form of pleading. The old cases contain much minute, not to say frivolous, technicality; but the substance of the doctrine is now reduced to something like what is expressed above. The requirement of an innuendo, where the words are not on the face of them libellous, is not affected by the abolition of forms of pleading. It is a matter of substance, for a plaintiff who sues on words not in themselves libellous, and does not allege in his claim that they conveyed a libellous meaning, and show what that meaning was, has failed to show any cause of action (*s*). Again, explanation is required if the words have not, for judicial purposes, any received ordinary meaning at all, as being foreign, provincial, or the like (*t*). This however is not quite the same thing as an innuendo. A libel in a foreign language might need both a translation to show the ordinary meaning of the words, and a distinct further innuendo to show that they bore a special injurious meaning.

Libellous tendency must be probable in law and proved in fact.

The actionable or innocent character of words depends not on the intention with which they were published, but on their actual meaning and tendency when published (*u*). * A man is bound to know the [* 218] natural effect of the language he uses. But where the plaintiff seeks to put an actionable meaning on words by which it is not obviously conveyed, he must make

(*r*) Capital and Counties Bank *v.* Henty (1882) 7 App. Ca. 741, where the law is elaborately discussed. For a shorter example of words held, upon consideration, not to be capable of such a meaning, see Mulligan *v.* Cole (1875) L. R. 10 Q. B. 549; for one on the other side of the line, Hart *v.* Wall (1877) 2 C. P. D. 146.

(*s*) See 7 App. Ca. 748 (Lord Selborne).

(*t*) Blake Odgers 109—112.

(*u*) 7 App. Ca. 768, 782, 790, cf. p. 787.

out that the words are capable of that meaning (which is matter of law) and that they did convey it (which is matter of fact): so that he has to convince both the Court and the jury, and will lose his cause if he fail with either (*x*). Words are not deemed capable of a particular meaning merely because it might by possibility be attached to them: there must be something in either the context or the circumstances that would suggest the alleged meaning to a reasonable mind (*y*). In scholastic language, it is not enough that the terms should be "patient" of the injurious construction; they must not only suffer it, but be fairly capable of it.

Repetition and reports may be libellous.

The publication is no less the speaker's or writer's own act, and none the less makes him answerable, because he only repeats what he has heard. Libel may consist in a fair report of statements which were actually made, and on an occasion which then and there justified the original speaker in making them (*z*); slander in the repetition of a rumour merely as a rumour, and without expressing any belief in its truth (*a*). "A man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion," and "as great an injury may accrue from the wrongful repetition as from the first publication of slander; the first utterer may have been a person insane or of bad character. The person who repeats it [* 219] gives greater weight to the slander" (*b*). * Circumstances of this kind may count for much in assessing damages, but they count for nothing towards determining whether the defendant is liable at all.

From this principle it follows, as regards spoken words that if A. speak of Z. words actionable only with special damage, and B. repeat them, and special damage ensue from the repetition only, Z. shall have an action against B., but not against A. (*c*). As to the defendant's belief in the truth of the matter published or

(*x*) Lord Blackburn, 7 App. Ca. 776.

(*y*) Lord Selborne, 7 App. Ca. 744; Lord Blackburn, *ib.* 778; Lord Bramwell, *ib.* 792, "I think that the defamer is he who, of many inferences, chooses a defamatory one."

(*z*) Purcell *v.* Sowler (1877) 2 C. P. Div. 215.

(*a*) Watkin *v.* Hall (1868) L. R. 3 Q. B. 396.

(*b*) Littledale J., McPherson *v.* Daniels (1829) 10 B. & C. 263, 273, adopted by Blackburn J., L. R. 3 Q. B. 400. The latter part of the 4th Resolution reported in the Earl of Northampton's case, 12 Co. Rep. 134, is not law. See per Parke J., 10 B. & C. at p. 275.

(*c*) See Parkins *v.* Scott (1862) 1 H. & C. 153; 31 L. J. Ex. 331; p. 208, above.

republished by him, that may affect the damages but cannot affect the liability. Good faith occurs as a material legal element only when we come to the exceptions from the general law that a man utters defamatory matter at his own peril.

3.—*Exceptions*

Exceptions: fair comment.

We now have to mention the conditions which exclude, if present, liability for words apparently injurious to reputation.

Nothing is a libel which is a fair comment on a subject fairly open to public discussion. This is a rule of common right, not of allowance to persons in any particular situation; and it is not correct to speak of utterances protected by it as being privileged. A man is no more *privileged* to make fair comments in public on the public conduct of others than to compete fairly with them in trade, or to build on his own land so as to darken their newly-made windows. There is not a cause of action with an excuse, but no cause of action at all. We conceive this to be settled by * the [* 220] leading case of Campbell *v.* Spottiswoode (*d*), which enforces the further consequence that the honesty of the critic's belief or motive is nothing to the purpose. The right is to publish such comment as in the opinion of impartial bystanders, as represented by the jury, may fairly arise out of the matter in hand. Whatever goes beyond this, even if well meant, is libellous. One test very commonly applicable is the distinction between action and motive; public acts and performances may be freely censured as their merits or probable consequences, but wicked or dishonest motives must not be imputed upon mere surmise. Such imputations, even if honestly made, are wrongful, unless there is in fact good cause for them. "Where a person has done or published anything which may fairly be said to have invited comment . . . every one has a right to make a fair and proper comment; and as long as he keeps within that limit, what he writes is not a libel; but that is not a privilege at all. . . . Honest belief may frequently be an element which the jury may take into consideration in considering whether or not an alleged

(*d*) 3 B. & S. 769; 32 L. J. Q. B. 185 (1863).

libel was in excess of a fair comment; but it cannot in itself prevent the matter being libellous" (*e*).

The case of a criticism fair in itself being proved to be due to unfair motives in the person making it is not known to have arisen, nor is it likely to arise, and it need not be here discussed (*f*). On principle it seems that the motive is immaterial; for if the criticism be in itself justifiable, there is nothing to complain of. Evidence tending to show the presence of improper motives [* 221] might well also * tend to show that the comment was not fair in itself, and thus be material on either view.

Henwood *v.* Harrison.

It is true that a later judgment of co-ordinate authority, delivered by one of the most learned of modern judges, has spoken of "the *privilege* of every subject of the realm to discuss matters of public interest *honestly and without actual malice*" (*g*), as being on the same footing with the right of free confidential communication on occasions which are privileged in the exact sense. But, although many authorities are there cited, Campbell *v.* Spottiswoode is not. And to say of a technical criticism, such as was before the Court in this case, that there is no evidence of malice, is practically equivalent to saying there is no evidence of its being otherwise than fair; the form of statement, therefore, can hardly be deemed necessary to the actual decision that no cause of action was shown. At all events this dictum cannot overrule what was decided in Campbell *v.* Spottiswoode.

What is open to comment matter of law.

What acts and conduct are open to public comment is a question for the Court, but one of judicial common sense rather than of technical definition. Subject-matter of this kind may be broadly classed under two types.

The matter may be in itself of interest to the common weal, as the conduct of persons in public offices or affairs (*h*), of those in authority, whether imperial or local

(*e*) Blackburn J., Campbell *v.* Spottiswoode, 32 L. J. Q. B. at p. 202.

(*f*) See however Wason *v.* Walter (1868) L. R. 4 Q. B. at p. 96, and Stevens *v.* Sampson (1879) 5 Ex. Div. 53.

(*g*) Henwood *v.* Harrison (1872) L. R. 7 C. P. 606, 626, per Willes J. The dissenting judgment of Grove J. is worthy of consideration.

(*h*) Including the conduct at a public meeting of persons who attend it as private citizens: Davis *v.* Duncan (1874) L. R. 9 C. P. 396. A clergyman is a public officer, or at any rate the con-

(*i*) in *the administration of the law, of the [* 222] managers of public institutions in the affairs of those institutions, and the like.

Or it may be laid open to the public by the voluntary act of the person concerned. The writer of a book offered for sale, the composer of music publicly performed, the author of a work of art publicly exhibited, the manager of a public entertainment, and all who appear as performers therein, the propounder of an invention or discovery publicly described with his consent, are all deemed to submit their work to public opinion, and must take the risks of fair criticism: which criticism, being itself a public act, is in like manner open to reply within commensurate limits.

Whether comment is fair, matter of fact (if libellous construction possible).

What is actually fair criticism is a question of fact, provided the words are capable of being understood in a sense beyond the fair expression of an unfavourable opinion on that which the plaintiff has submitted to the public: this is only an application of the wider principle above stated as to the construction of a supposed libel (*k*).

In literary and artistic usage criticism is hardly allowed to be fair which does not show competent intelligence of the subject-matter. Courts of justice have not the means of applying so fine a test: and a right of criticism limited to experts would be no longer a common right but a privilege.

The right of fair criticism will, of course, not cover untrue statements of alleged specific acts of misconduct (*l*).

Justification on ground of truth.

Defamation is not actionable if the defendant shows that the defamatory matter was true; and if it was so, the * purpose or motive with which it was [* 223] published is irrelevant. For although in the current phrase the statement of matter "true in substance and in fact" is said to be justified, this is not because any merit is attached by the law to the disclosure of all truth in season and out of season (indeed it may be a criminal offence), but because of the demerit attaching to the plaintiff if the imputation is true, whereby he is

duct of public worship and whatever is incidental thereto is matter of public interest: Kelly *v.* Tinling (1865) L. R. 1 Q. B. 699, ep. Kelly *v.* Sherlock (1866) *ib.* at p. 689.

(*i*) Purcell *v.* Sowler, 2 C. P. Div. 215.

(*k*) Jennor *v.* A'Beckett (1871) L. R. 7 Q. B. 11. *Qu.* whether the dissenting judgment of Lush J. was not right.

(*l*) Davis *v.* Shepstone (1886) J. C. 11 App. Ca. 187.

deemed to have no ground of complaint for the fact being communicated to his neighbours. It is not that uttering truth always carries its own justification, but that the law bars the other party of redress which he does not deserve. Thus the old rule is explained, that where truth is relied on for justification, it must be specially pleaded; the cause of action was confessed, but the special matter avoided the plaintiff's right (*m*). "The law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess" (*n*). This defence, as authority and experience show, is not a favoured one. To adopt it is to forego the usual advantages of the defending party, and commit oneself to a counter-attack in which only complete success will be profitable, and failure will be disastrous.

Must be substantially complete.

What the defendant has to prove is truth in substance, that is, he must show that the imputation made or repeated by him was true as a whole and in every material part thereof. What parts of a statement are material, in the sense that their accuracy or inaccuracy makes a sensible difference in the effect of the whole, is a question of fact (*o*).

There may be a further question whether the matter [* 224] * alleged as justification is sufficient, if proved, to cover the whole cause of action arising on the words complained of; and this appears to be a question of law, save so far as it depends on the fixing of that sense, out of two or more possible ones, which those words actually conveyed. It is a rule of law that one may not justify calling the editor of a journal a "felon editor" by showing that he was once convicted of felony. For a felon is one who has actually committed felony, and who has not ceased to be a felon by full endurance of the sentence of the law, or by a pardon; not a man erroneously convicted, or one who has been convicted and duly discharged. But it may be for a jury to say whether calling a man a "convicted felon" imputed the quality of felony generally, or only conveyed the fact that at some time he was convicted (*p*). Where

(*m*) Compare the similar doctrine in trespass, which has peculiar consequences. But of this in its place.

(*n*) Littledale J. 10 B. & C. at p. 272.

(*o*) Alexander *v.* North Eastern R. Co. (1865) 6 B. & S. 340; 34 L. J. Q. B. 152.

(*p*) Leyman *v.* Latimer (1878) 3 Ex. Div. 452.

the libel charges a criminal offence with circumstances of moral aggravation, it is not a sufficient justification to aver the committing of the offence without those circumstances, though in law they may be irrelevant, or relevant only as evidence of some element or condition of the offence (*q*). The limits of the authority which the court will exercise over juries in handling questions of "mixed fact and law" must be admitted to be hard to define in this and other branches of the law of defamation.

Defendant's belief immaterial.

Apparently it would make no difference in law that the defendant had made a defamatory statement without any belief in its truth, if it turned out afterwards to have been true when made: as, conversely, it is certain that the most honest and even reasonable belief is of itself no justification. The case is not strictly analogous to that of fair * comment, [* 225] and seems untouched by the dicta we have mentioned as raising a certain doubt on that subject. Costs, however, are now in the discretion of the Court.

Immunity of members of Parliament and judges.

In order that public duties may be discharged without fear, unqualified protection is given to language used in the exercise of parliamentary and judicial functions. A member of Parliament cannot be lawfully molested outside Parliament by civil action, or otherwise, on account of anything said by him in his place in either House (*r*). An action will not lie against a judge for any words used by him in his judicial capacity in a court of justice (*s*). It is not open to discussion whether the words were or were not in the nature of fair comment on the matter in hand, or otherwise relevant or proper, or whether or not they were used in good faith.

Other persons in judicial proceedings.

Parties, advocates, and witnesses in a court of justice are under the like protection. They are subject to the authority of the Court itself, but whatever they say

(*q*) Helsham *v.* Blackwood (1851) 11 C. B. 128; 20 L. J. C. P. 187, a very curious case.

(*r*) St. 4 Hen. 8, c. 8 (Pro Ricardo Strode); Bill of Rights. 1 Wm. & M. sess. 2, c. 2, "That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament."

(*s*) Scott *v.* Stansfield (1868) L. R. 3 Ex. 220; the protection extends to judicial acts, see the chapter of General Exceptions above, pp. 99—101, and further illustrations *ap.* Blake Odgers 189.

in the course of the proceedings and with reference to the matter in hand is exempt from question elsewhere. It is not slander for a prisoner's counsel to make insinuations against the prosecutor, which might, if true, explain some of the facts proved, however gross and unfounded those insinuations may be (*t*); nor for a witness after his cross-examination to volunteer a statement [* 226] of opinion by way of * vindicating his credit, which involves a criminal accusation against a person wholly unconnected with the case (*u*). The only limitation is that the words must in some way have reference to the inquiry the Court is engaged in. A duly constituted military court of inquiry is for this purpose on the same footing as an ordinary court of justice (*x*). So is a select committee of the House of Commons (*y*). Statements coming within this rule are said to be "absolutely privileged." The reason for precluding all discussion of their reasonableness or good faith before another tribunal is one of public policy, laid down to the same effect in all the authorities. The law does not seek to protect a dishonest witness or a reckless advocate, but deems this a less evil than exposing honest witnesses and advocates to vexatious actions.

Reports of officers, &c.

As to reports made in the course of naval or military duty, but not with reference to any pending judicial proceeding, it is doubtful whether they come under this head or that of "qualified privilege." A majority of the Court of Queen's Bench has held (against a strong dissent), not exactly that they are "absolutely privileged," but that an ordinary court of law will not determine questions of naval or military discipline and duty. But the decision is not received as conclusive (*z*).

(*t*) Munster *v.* Lamb (1883) 11 Q. B. Div. 588, where authorities are collected.

(*u*) Seaman *v.* Netherclift (1876) 2 C. P. Div. 53.

(*x*) Dawkins *v.* Lord Rokeby (1873-5) Ex. Ch. and H. L., L. R. 8 Q. B. 255; 7 H. L. 744, see opinion of judges at p. 752; Dawkins *v.* Prince Edward of Saxe Weimar (1876) 1 Q. B. D. 499.

(*y*) Goffin *v.* Donnelly (1881) 6 Q. B. D. 307.

(*z*) Dawkins *v.* Lord Paulet (1869) L. R. 5 Q. B. 94, see the dissenting judgment of Cockburn C. J., and the notes of Mr. Justice Stephen, Dig. Cr. L. art. 276, and Mr. Blake Odgers, *op. cit.* 195. The reference of the Judicial Committee to the case in Hart *v.* Gumpach (1872) L. R. 4 P. C. 439, 464, is quite neutral. They declined to presume that such an "absolute privilege" existed by the law and customs of China as to official reports to the Chinese Government.

* There is an important class of cases in [* 227] which a middle course is taken between the common rule of unqualified responsibility for one's statements, and the exceptional rules which give, as we have just seen, absolute protection to the kinds of statements covered by them. In many relations of life the law deems it politic and necessary to protect the honest expression of opinion concerning the character and merits of persons, to the extent appropriate to the nature of the occasion, but not necessary to prevent the person affected from showing, if he can, that an unfavourable opinion expressed concerning him is not honest. Occasions of this kind are said to be privileged, and communications made in pursuance of the duty or right incident to them are said to be privileged by the occasion. The term "qualified privilege" is often used to mark the requirement of good faith in such cases, in contrast to the cases of "absolute privilege" above mentioned. Fair reports of judicial and parliamentary proceedings are put by the latest authorities in the same category. Such reports must be fair and substantially correct in fact to begin with, and also must not be published from motives of personal ill-will; and this although the matter reported was "absolutely privileged" as to the original utterance of it.

Qualified immunity of "privileged communications."

The conditions of immunity may be thus summed up:—

Conditions of the privilege.

The occasion must be privileged; and if the defendant establishes this, he will not be liable unless the plaintiff can prove that the communication was not honestly made for the purpose of discharging a legal, moral or social duty, or with a view to the just protection of some private interest or of the public good by giving information * appearing proper to be [* 228] given, but from some improper motive and without due regard to truth.

Such proof may consist either in external evidence of personal ill-feeling or disregard of the truth of the matter, or in the manner or terms of the communication, or acts accompanying and giving point to it, being unreasonable and improper, "in excess of the occasion," as we say.

The rule formerly was, and still sometimes is, expressed in an artificial manner derived from the style of pleading at common law.

"Express malice."

The law, it is said, presumes or implies malice in all

cases of defamatory words; this presumption may be rebutted by showing that the words were uttered on a privileged occasion; but after this the plaintiff may allege and prove express or actual malice, that is, wrong motive. He need not prove malice in the first instance, because the law presumes it; when the presumption is removed, the field is still open to proof. But the "malice in law" which was said to be presumed is not the same as the "express malice" which is matter of proof. To have a lawful occasion and abuse it may be as bad as doing harm without any lawful occasion, or worse; but it is a different thing in substance. It is better to say that where there is a duty, though of imperfect obligation, or a right, though not answering to any legal duty, to communicate matter of a certain kind, a person acting on that occasion in discharge of the duty or exercise of the right incurs no liability, and the burden of proof is on those who allege that he was not so acting (*a*).

What are privileged occasions.

The occasions giving rise to privileged communications may be in matters of legal or social duty, as [* 229] where a * confidential report is made to an official superior, or in the common case of giving a character to a servant; or they may be in the way of self-defence, or the defence of an interest common to those between whom the words or writing pass; or they may be addressed to persons in public authority with a view to the exercise of their authority for the public good; they may also be matter published in the ordinary sense of the word for purposes of general information.

Moral of social duty.

As to occasions of private duty; the result of the authorities appears to be that any state of facts making it right in the interests of society for one person to communicate to another what he believes or has heard regarding any person's conduct or character will constitute a privileged occasion (*b*).

Answers to confidential inquiries, or to any inquiries made in the course of affairs for a reasonable purpose, are clearly privileged. So are communications made by a person to one to whom it is his especial duty to give information by virtue of a standing relation between them, as by a solicitor to his client about the

(*a*) See per Lord Blackburn, 7 App. Ca. 787.
(*b*) See per Blackburn J. in Davies *v.* Snead (1870) L. R. 5 Q. B. at p. 611.

soundness of a security, by a father to his daughter of full age about the character and standing of a suitor, and the like. Statements made without request and apart from any special relation of confidence may or may not be privileged according to the circumstances; but it cannot be prudently assumed that they will be (*c*). The nature of the interest for the sake of which the communication is made (as whether it be public or private, whether it is one touching the preservation of life, honour, or morals, or only matters of ordinary * business), the apparent importance and [* 230] urgency of the occasion, and other such points of discretion for which no general rule can be laid down, will all have their weight; how far any of them will outweigh the general presumption against officious interference must always be more or less doubtful (*d*).

Examples of privileged communications in self-protection, or the protection of a common interest, are a warning given by a master to his servants not to associate with a former fellow-servant whom he has discharged on the ground of dishonesty (*e*); a letter from a creditor of a firm in liquidation to another of the creditors, conveying information and warning as to the conduct of a member of the debtor firm in its affairs (*f*). The holder of a public office, when an attack is publicly made on his official conduct, may defend himself with like publicity (*g*). Self-protection.

Communications addressed in good faith to persons in a public position for the purpose of giving them information to be used for the redress of grievances, the punishment of crime, or the security of public morals, are in like manner privileged, provided the subject-matter is at least reasonably believed to be within the competence of the person addressed (*h*). The commu- Information for public good.

(*c*) Cases of this kind have been very troublesome. See Blake Odgers 215—219.

(*d*) See Coxhead *v.* Richards (1846) 2 C. B. 569; 15 L. J. C. P. 278, where the Court was equally divided, rather as to the reasonably apparent urgency of the particular occasion than on any definable principle.

(*e*) Somerville *v.* Hawkins (1850) 10 C. B. 583; 20 L. J. C. P. 133.

(*f*) Spill *v.* Maule (1869) Ex. Ch. L. R. 4 Ex. 232.

(*g*) Langhton *v.* Bishop of Sodor and Man (1872) L. R. 4 P. C. 495.

(*h*) Harrison *v.* Bush (1855) 5 E. & B. 344; 25 L. J. Q. B. 25. There however it was held that it was not, in fact, irregular to address a memorial complaining of the conduct of a justice of the

[* 231] nication to an incumbent of * reports affecting the character of his curate is privileged, at all events if made by a neighbour or parishioner; so are consultations between the clergy of the immediate neighbourhood arising out of the same matter (*i*

Fair reports.

Fair reports (as distinguished from comment) are a distinct class of publications enjoying the protection of "qualified privilege" to the extent to be mentioned. The fact that imputations have been made on a privileged occasion will, of course, not exempt from liability a person who repeats them on an occasion not privileged. Even if the original statement be made with circumstances of publicity, and be of the kind known as "absolutely privileged," it cannot be stated as a general rule that republication is justifiable. Certain specific immunites have been ordained by modern decisions and statutes. They rest on particular grounds, and are not to be extended (*k*). Matter not coming under any of them must stand on its own merits, if it can, as a fair comment on a subject of public interest (*l*).

Parliamentary papers.

By statute (3 & 4 Vict. c. 9, A.D. 1840) the publication of any reports, papers, votes, or proceedings of either House of Parliament by the order or under the authority of that House is absolutely protected, and so is [* 232] the * republication in full. Extracts and abstracts are protected if in the opinion of the jury they were published *bona fide*, and without malice (*m*).

Parliamentary debates and judicial proceedings.

Fair reports of parliamentary and public judicial proceedings are treated as privileged communications. It has long been settled (*n*) that fair and substantially ac-

peace to a Secretary of State (see the judgment of the Court as to the incidents of that office), though it would be more usual to address such a memorial to the Lord Chancellor. Complaints made to the Privy Council against an officer whom the Council is by statute empowered to remove are in this category; the absolute privilege of judicial proceedings cannot be claimed for them, though the power in question may be exercisable only on inquiry: Proctor *v.* Webster (1885) 16 Q. B. D. 112.

(*i*) Clark *v.* Molyneux (1877) 3 Q. B. Div. 237.

(*k*) See Davis *v.* Shepstone (1883) J. C., 11 App. Ca. 187.

(*l*) See Henwood *v.* Harrison (1872) L. R. 7 C. P. 606; but I confess myself unable to reconcile much of the language used in that case with Campbell *v.* Spottiswoode, *supra*, pp. 220, 221, which was not cited.

(*m*) See Blake Odgers, *op. cit.* 187. The words of the Act, in their literal construction, appear to throw the burden of proving good faith on the publisher, which probably was not intended.

(*n*) Per Cur. in Wason *v.* Walter, L. R. 4 Q. B. at p. 87.

curate reports of proceedings in courts of justice are on this footing. As late as 1868 it was decided (*o*) that the same measure of immunity extends to reports of parliamentary debates, notwithstanding that proceedings in Parliament are technically not public. In the case of judicial proceedings it is immaterial whether they are preliminary or final, and, according to the prevailing modern opinion, whether contested or *ex parte*, and also whether the Court actually has jurisdiction or not, provided that it is acting in an apparently regular manner (*p*). The report need not be a report of the whole proceedings (*pp*). The rule does not extend to justify the reproduction of matter in itself obscene, or otherwise unfit for general publication (*q*), or of proceedings of which the publication is forbidden by the Court in which they took place.

Volunteered reports.

An ordinary newspaper report furnished by a regular reporter is all but conclusively presumed, if in fact fair * and substantially correct, to have been pub- [* 233] lished in good faith; but an outsider who sends to a public print even a fair report of judicial proceedings containing personal imputations invites the question whether he sent it honestly for purposes of information, or from a motive of personal hostility; if the latter is found to be the fact, he is liable to an action (*r*).

Act of 1881 as to newspaper reports.

A specially qualified protection is given to newspaper reports of public meetings by a curiously framed statute of 1881 (*s*). The meeting must be lawfully convened for a lawful purpose and open to the public (*t*); the re-

(*o*) Wason *v.* Walter, L. R. 4 Q. B. 73. And editorial comments on a debate published by the same newspaper which publishes the report are entitled to the benefit of the general rule as to fair comment on public affairs: *ib.*

(*p*) Usill *v.* Hales (1878) 3 C. P. D. 319, where the proceeding reported was an application to a police magistrate, who, after hearing the facts stated, declined to act on the ground of want of jurisdiction; Lewis *v.* Levy (1858) E. B. & E. 537; 27 L. J. Q. B. 282.

(*pp*) Macdougall *v.* Knight (1886) 17 Ch. Div. 636 (report of judgment alone privileged).

(*q*) Steele *v.* Brannan (1872) L. R. 7 C. P. 261 (a criminal case).

(*r*) Stevens *v.* Sampson (1879) 5 Ex. Div. 53.

(*s*) The Newspaper Libel and Registration Act, 1881, 44 & 45 Vict. c. 60, s. 2. Its interpretation clause is almost a *reductio ad absurdum* of modern abuses of parliamentary drafting. See the definitions of "newspaper," "occupation," "place of residence."

(*t*) Hence it appears that in the opinion of Parliament there may be meetings lawfully convened for unlawful purposes, and public meetings not open to the public: *quod mirum.*

port must not only be "fair and accurate, and published without malice," but the publication of the matter complained of must have been for the public benefit; and the defendant must not have refused (*u*) on request to insert in the same newspaper a reasonable explanation or contradiction of the injurious matter. No case is known to have been decided on this enactment in a court of civil jurisdiction. I am disposed to think with Mr. Blake Odgers (*x*) that it is of doubtful necessity or utility.

Excess of privilege.

In the case of privileged communications of a confidential kind, the failure to use ordinary means of ensuring privacy—as if the matter is sent on a post-card [* 234] instead of * in a sealed letter, or telegraphed without evident necessity—will destroy the privilege; either as evidence of malice, or because it constitutes a publication to persons in respect of whom there was not any privilege at all. The latter view seems on principle the better one (*y*). It would also seem that if a communication intended to be made on a privileged occasion is by the sender's negligence (as by putting letters in wrong envelopes) delivered to a person who is a stranger to that occasion, the sender has not any benefit of privilege. The contrary has been decided by a Divisional Court (*z*), but we have reason to think that the decision is by no means universally accepted in the profession as good law.

Honest belief is not necessarily reasonable belief.

Where the existence of a privileged occasion is established, we have seen that the plaintiff must give affirmative proof of malice, that is, a dishonest personal ill-will, in order to succeed. It is not for the defendant to prove that his belief was founded on reasonable grounds. To constitute malice there must be something more than the absence of reasonable ground for belief in the matter communicated. That may be evidence of reckless disregard of truth, but is not always even such evidence. A man may be honest and yet unreasonably credulous; or it may be proper for him to communicate reports or suspicions which he himself does not believe. In either

---

(*u*) Presumably we must understand, having authority to procure the insertion. The word *refuse* may sufficiently imply, in judgment of law, power to permit.

(*x*) *Op. cit.* 261.

(*y*) Williamson *v.* Freer (1874) L. R. 9 C. P. 393.

(*z*) Thompson *v.* Dashwood (1883) 11 Q. B. D. 43

case he is within the protection of the rule (*a*). It has been found difficult to impress this distinction upon juries, and the involved language of the authorities about "implied" and "express" malice has, no doubt, added to the difficulty. * The result is that [* 235] the power of the Court to withhold a case from the jury on the ground of a total want of evidence has on this point been carried very far (*b*). In theory, however, the relation of the Court to the jury is the same as in other questions of "mixed fact and law." Similar difficulties have been felt in the law of Negligence, as we shall see under that head.

Special procedure in actions for newspaper libels.

Lord Campbell's Act (6 & 7 Vict. c. 96, ss. 1, 2), contains special provisions as to proving the offer of an apology in mitigation of damages in actions for defamation, and payment into court together with apology in actions for libel in a public print (*c*).

(*a*) Clark *v.* Molyneux (1877) 3 Q. B. Div. 237, per Bramwell L. J. at p. 244; per Brett L. J. at pp. 247–8; per Cotton L. J. at p. 249.

(*b*) Laughton *v.* Bishop of Sodor and Man (1872) L. R. 4 P. C. 495, and authorities there cited; Spill *v.* Maule (1869) Ex. Ch. L. R. 4 Ex. 232.

(*c*) The Rules of Court of 1875 had the effect of enlarging and so far superseding the latter provision; but see now Order XXII. r. 1, and "The Annual Practice" thereon.

[* 236] * CHAPTER VIII.

WRONGS OF FRAUD AND MALICE.

I.—*Deceit.*

Nature of the wrong.

In the foregoing chapters we dealt with wrongs affecting the so-called primary rights to security for a man's person, to the enjoyment of the society and obedience of his family, and to his reputation and good name. In these cases, exceptional conditions excepted, the knowledge or state of mind of the person violating the right is not material for determining his legal responsibility. This is so even in the law of defamation, as we have just seen, the artificial use of the word "malice" notwithstanding. We now come to a kind of wrongs in which either a positive wrongful intention, or such ignorance or indifference as amounts to guilty recklessness (in Roman terms either *dolus* or *culpa lata*) is a necessary element; so that liability is founded not in an absolute right of the plaintiff, but in the unrighteousness of the defendant.

Concurrent jurisdiction of common law and equity.

The wrong called Deceit consists in leading a man into damage by wilfully or recklessly causing him to believe and act on a falsehood. It is a cause of action by the common law (the action being an action on the case founded on the ancient writ of deceit (*a*), which had a much narrower scope): and it has likewise been dealt with by courts of equity under the general juris- [* 237] diction of * the Chancery in matters of fraud. The principles worked out in the two jurisdictions are believed to be identical (*b*), though there may be a theoretical difference as to the character of the remedy, which in the Court of Chancery did not purport to be damages but restitution (*c*). Since 1875, therefore, we have in this case a real and perfect fusion of rules of common law and equity which formerly were distinct, though parallel and similar.

(*a*) F. N. B. 95 E. *sqq.*
(*b*) See per Lord Chelmsford, L. R. 6 H. L. at p. 390.
(*c*) See p. 167, above.

The subject has been one of considerable difficulty for several reasons. Difficulties of the subject: complication with contract.

First, the law of tort is here much complicated with the law of contract. A false statement may be the inducement to a contract, or may be a part of a contract, and in these capacities may give rise to a claim for the rescission of the contract obtained by its means, or for compensation for breach of the contract or of a collateral warranty. A false statement unconnected with any contract may likewise create, by way of estoppel, an obligation analogous to contract. And a statement capable of being regarded in one or more of these ways may at the same time afford a cause of action in tort for deceit. "If, when a man thinks it highly probable that a thing exists, he chooses to say he knows the thing exists, that is really asserting what is false: it is positive fraud. That has been repeatedly laid down. . . . If you choose to say, and say without inquiry, 'I warrant that,' that is a contract. If you say, 'I know it,' and if you say that in order to save the trouble of inquiry, that is a false representation—you are saying what is false to induce them to act upon it" (*d*).

The grounds and results of these forms of liability are * largely similar, but cannot be assumed [* 238] to be identical. The authorities establishing what is a cause of action for deceit are to a large extent convertible with those which define the right to rescind a contract for fraud or misrepresentation, and the two classes of cases are commonly cited without any express discrimination. Yet we have no warrant before close examination for making sure that they are convertible to the full extent.

Secondly, there are difficulties as to the amount of actual fraudulent intention that must be proved against a defendant. A man may be, to all practical intents, deceived and led into loss by relying on words or conduct of another which did not proceed from any set purpose to deceive, but perhaps from an unfounded expectation that what he stated or suggested would be justified by the event. In such a case it seems hard that the party misled should not have a remedy, and yet there is something harsh in saying that the other is guilty of fraud or deceit. An over-sanguine and careless man may do as much harm as a deliberately fraudu- Questions of fraudulent intent.

(*d*) Lord Blackburn, Brownlie *v.* Campbell (1880), 5 App. Ca. (Sc.) at p. 953.

lent one, but the moral blame is not equal. Again, the jurisdiction of courts of equity in these matters has always been said to be founded on fraud. Equity judges, therefore, were unable to frame a terminology which should clearly distinguish fraud from culpable misrepresentation not amounting to fraud, but having similar consequences in law: and on the contrary they were driven, in order to maintain and extend a righteous and beneficial jurisdiction, to such vague and confusing phrases as "constructive fraud," or "conduct fraudulent in the eyes of this Court." Thus they obtained in a cumbrous fashion the results of the bolder Roman maxim *culpa lata dolo aequiparatur*. The results were good, but, being so obtained, entailed the [* 239] cost of much * laxity in terms and some laxity of thought. Of late years there has been a reaction against this habit, wholesome in the main, but not free from some danger of excess. "Legal fraud" is an objectionable term, but it does not follow that it has no real meaning (*d*). One might as well say that the "common counts" for money had and received, and the like, which before the Judicature Acts were annexed to most declarations in contract, disclosed no real cause of action, because the "contract implied in law" which they supposed was not founded on any actual request or promise.

Fraud of agents.

Thirdly, special difficulties of the same kind have arisen with regard to false statements made by an agent in the course of his business and for his principal's purposes, but without express authority to make such statements. Under these conditions it has been thought harsh to hold the principal answerable; and there is a further aggravation of difficulty in that class of cases (perhaps the most important) where the principal is a corporation, for a corporation has been supposed not to be capable of a fraudulent intention. We have already touched on this point (*e*); and the other difficulties appear to have been surmounted, or to be in the way of being surmounted, by our modern authorities.

General conditions of the right of action.

Having indicated the kind of problems to be met with, we proceed to the substance of the law.

To create a right of action for deceit there must be

(*d*) See per Bramwell L. J., Weir *v.* Bell, 3 Ex. D. at p. 243.

(*e*) P. 51, above. The difficulties may be said to have culminated in Udell *v.* Atherton (1861) 7 H. & N. 172; 30 L. J. Ex. 337, where the Court was equally divided.

a statement made by the defendant, or for which he is * answerable as principal, and with regard to [* 240] that statement all the following conditions must concur:

(a) It is untrue in fact.

(b) The person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, reckless or careless) (*f*) whether it be true or not.

(c) It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it (*g*).

(d) The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage (*h*).

There is no cause of action without actual damage, or the damage is the gist of the action (*i*).

And according to the general principles of civil liability, the damage must be the natural and probable consequence of the plaintiff's action on the faith of the defendant's statement.

(e) The statement must be in writing and signed in one class of cases, namely where it amounts to a guaranty; but this requirement is statutory, and as it did not apply to the Court of Chancery, does not seem to apply to the High Court of Justice in its equitable jurisdiction.

Of these heads in order.

Falsehood in fact.

* (a) A statement can be untrue in fact [* 241] only if it purports to state matter of fact. A promise is distinct from a statement of fact, and breach of contract, whether from want of power or of will to perform one's promise, is a different thing from deceit. Again a mere statement of opinion or inference, the facts on which it purports to be founded being notorious or equally known to both parties, is different from a state-

(*f*) Cotton L. J., 29 Ch. Div. 479.

(*g*) See Polhill *v.* Walter, 3 B. & Ad. 114, 123.

(*h*) Cp. for the general rules Lord Hatherly (Page Wood, V.-C.), Barry *v.* Croskey (1861) 2 J. & H. at pp. 22–3, approved by Lord Cairns in Peck *v.* Gurney, L. R. 6 H. L. at p. 413; Bowen L. J., Edgington *v.* Fitzmaurice (1885) 29 Ch. Div. at pp. 481–2; and Lindley L. J., Smith *v.* Chadwick (1882) 20 Ch. Div. at p. 75.

(*i*) Lord Blackburn, Smith *v.* Chadwick (1884) 9 App. Ca. at p. 196.

ment importing that certain matters of facts are within the particular knowledge of the speaker. A man cannot hold me to account because he has lost money by following me in an opinion which turned out to be erroneous. In particular cases, however, it may be hard to draw the line between a mere expression of opinion and an assertion of specific fact (*j*). And a man's intention or purpose at a given time is in itself a matter of fact, and capable (though the proof be seldom easy) of being found as a fact. "The state of a man's mind is as much a fact as the state of his digestion" (*k*). It is settled that the vendor of goods can rescind the contract on the ground of fraud if he discovers within due time that the buyer intended not to pay the price (*l*).

When a prospectus is issued to shareholders in a company or the like to invite subscriptions to a loan, a statement of the purposes for which the money is wanted—in other words, of the borrower's intention as to its application—is a material statement of fact, and [* 242] if untrue may be *ground for an action of deceit (*m*). The same principle would seem to apply to a man's statement of the reasons for his conduct, if intended or calculated to influence the conduct of those with whom he is dealing (*n*); as if an agent employed to buy falsely names, not merely as the highest price he is willing to give, but as the actual limit of his authority, a sum lower than that which he is really empowered to deal for.

Misrepresentations of law.

A representation concerning a man's private rights, though it may involve matters of law, is as a whole deemed to be a statement of fact. Where officers of a company incorporated by a private Act of Parliament accept a bill in the name of the company, this is a repre-

(*j*) Compare Pasley *v.* Freeman (1789) 3 T. R. 51, with Haycraft *v.* Creasy (1801) 2 East 92, where Lord Kenyon's dissenting judgment may be more acceptable to the latter-day reader than those of the majority.

(*k*) Bowen L. J. 29 Ch. Div. 483.

(*l*) Clough *v.* L. and N. W. R. Co. (1871) Ex. Ch. L. R. 7 Ex. 26; cp. per Mellish L. J., *Ex parte* Whittaker (1875) 10 Ch. at p. 449. Whether in such case an action of deceit would lie is a merely speculative question, as if rescission is impracticable, and if the fraudulent buyer is worth suing, the obviously better course is to sue on the contract for the price.

(*m*) Edgington *v.* Fitzmaurice (1884) 29 Ch. Div. 459.

(*n*) It is submitted that the contrary opinion given in Vernon *v.* Keys (1810) Ex. Ch. 4 Taunt. 488, can no longer be considered law.

sentation that they have power so to do under the Act of Parliament, and the existence or non-existence of such power is a matter of fact. "Suppose I were to say I have a private Act of Parliament which gives me power to do so and so. Is not that an assertion that I have such an Act of Parliament? It appears to me to be as much a representation of a matter of fact as if I had said I have a particular bound copy of Johnson's Dictionary" (*o*). A statement about the existence or actual text of a public Act of Parliament, or a reported decision, would seem to be no less a statement of fact. With regard to statements of matters of general law made only by implication, or statements of pure propositions of the law, the rule may perhaps be this, that in dealings between parties who have equal means of ascertaining the law, the one will not be presumed to rely upon a statement of matter of law made by * the [* 243] other (*p*). It has never been decided whether proof of such reliance is admissible; it is submitted that if the case arose it could be received, though with caution. Of course a man will not in any event be liable to an action of deceit for misleading another by a statement of law, however erroneous, which at the time he really believed to be correct. That cause would fall into the general category of honest though mistaken expressions of opinion. If there be any ground of liability, it is not fraud but negligence, and it must be shown that the duty of giving competent advice had been assumed or accepted.

Falsehood by garbled statements.

It remains to be noted that a statement of which every part is literally true may be false as a whole, if by reason of the omission of material facts it is as a whole calculated to mislead a person ignorant of those facts into an inference contrary to the truth (*q*).

Knowledge or belief of defendant.

(b) As to the knowledge and belief of the person making the statement.

(*o*) West London Commercial Bank *v.* Kitson (1884) 13 Q. B. Div. 360, per Bowen L. J. at p. 363.

(*p*) This appears to be the real ground of Rashdall *v.* Ford (1866) 2 Eq. 750.

(*q*) "There must, in my opinion, be some active misstatement of fact, or at all events such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false:" Lord Cairns, L. R. 6 H. L. 403.

He may believe it to be true (*r*). In that case he incurs no liability, nor is he bound to show that his belief was founded on such grounds as would produce the same belief in a prudent and competent man (*s*), except so far as the absence of reasonable cause may tend to [* 244] the * inference that there was not any real belief. An honest though dull man cannot be held guilty of fraud any more than of "express malice"; but there is a point beyond which courts will not believe in honest stupidity. "If an untrue statement is made," said Lord Chelmsford, "founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit" (*t*); Lord Cranworth preferred to say that such circumstances might be strong evidence that the statement was not really believed to be true (*u*). But the rule is subject to a qualification, to be presently mentioned, in the case of matters which have actually been within a man's knowledge in the course of business or duty connected with the transaction in hand.

Representations subsequently discovered to be untrue.

If, having honestly made a representation, a man discovers that it is not true before the other party has acted upon it, what is his position? It seems on principle that, as the offer of a contract is deemed to continue till revocation or acceptance, here the representation must be taken to be continuously made until it is acted upon, so that from the moment the party making it discovers that it is false and, having the means of communicating the truth to the other party, omits to do so, he is in point of law making a false representation with knowledge of its untruth. And such has been declared to be the rule of the Court of Chancery for the purpose of setting aside a deed. "The case is not at all [* 245] varied by the circumstance that the untrue *representation, or any of the untrue representations, may in the first instance have been the result of innocent error. If, after the error has been discovered, the party

(*r*) Collins *v.* Evans (1844) Ex. Ch. 5 Q. B. 820; 13 L. J. Q. B. 180. Good and probable reason as well as good faith was pleaded and proved.

(*s*) Taylor *v.* Ashton (1843) 11 M. & W. 401; 12 L. J. Ex. 363, but the actual decision is not consistent with the doctrine of the modern cases on the duty of directors of companies.

(*t*) Western Bank of Scotland *v.* Addie (1867) L. R. 2 Sc. at p. 162.

(*u*) *Ib.* at 168. In America Lord Chelmsford's opinion seems to prevail: see Cooley on Torts, 501.

who has innocently made the incorrect representation suffers the other party to continue in error and act on the belief that no mistake has been made; this from the time of the discovery becomes, in the contemplation of this Court, a fradulent misrepresentation even though it was not so originally" (*x*). We do not know of any authority against this being the true doctrine of common law as well as of equity, or as applicable to an action for deceit as to the setting aside of a contract or conveyance. Analogy seems in its favour (*y*). Since the Judicature Acts, however, it is sufficient for English purposes to accept the doctrine from equity. The same rule holds if the representation was true when first made, but ceases to be true by reason of some event within the knowledge of the party making it and not within the knowledge of the party to whom it is made (*z*).

Assertions made in reckless ignorance.

On the other hand if a man states as fact what he does not believe to be fact, he speaks at his peril; and this whether he knows the contrary to be true or has no knowledge of the matter at all, for the pretence of having certain information which he has not is itself a deceit. * "He takes upon himself to warrant [* 246] his own belief of the truth of that which he so asserts" (*a*). "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue" (*b*). These dicta, one of an eminent common law judge, the other of an eminent chancellor, are now both classical; their direct application was to the repudiation of contracts obtained by fraud or misrepresentation, but they state a principle

(*x*) Reynell *v.* Spryc (1852) 1 D M. G. 660, 709, Lord Cranworth cp. Jessel M. R. Redgrave *v* Hurd (1881) 20 Ch. Div. 12, 13.

(*y*) Compare the doctrine of continuous taking in trespass *de bonis asportatis*, which is carried out to graver consequences in the criminal law. Jessel M. R. assumed the common law rule to be in some way narrower than that of equity (20 Ch. Div. 13), but this was an extra-judicial dictum.

(*z*) Traill *v.* Baring (1864) 4 D. J. S. 318, the difficulty of making out how there was any representation of fact in that case as distinguished from a promise or condition of a contract is not material to the present purpose.

(*a*) Maule J., Evans *v.* Edmonds (1853) 13 C. B. 777, 786; 22 L. J. C. P. 211.

(*b*) Lord Cairns, Reese River Silver Mining Co. *v.* Smith (1869) L. R. 4 H. L. 64, 79.

which is well understood to include liability in an action for deceit (*c*).

Breach of a special duty to give correct information.

With regard to transactions in which a more or less stringent duty of giving full and correct information (not merely of abstaining from falsehood or concealment equivalent to falsehood) is imposed on one of the parties, it may be doubted whether an obligation of this kind annexed by law to particular classes of contracts can ever be treated as independent of contract. If a misrepresentation by a vendor of real property, for example, is wilfully or recklessly false, it comes within the general description of deceit. But there are errors of mere inadvertence which constantly suffice to avoid contracts of these kinds, and in such cases I do not think an action for deceit (or the analogous suit in equity) is known to have been maintained. As regards these kinds of contracts, therefore—but, it is submitted, these only—the right of action for misrepresentation as [* 247] a wrong is not co-extensive with the * right of rescission. In some cases compensation may be recovered as an exclusive or alternative remedy, but on different grounds, and subject to the special character and terms of the contract.

False assertion as to matters within the party's former knowledge.

The qualification of the rule that the defendant must be shown not to have believed the truth of his assertion (if it really be a qualification) is that a person cannot excuse himself for misrepresenting material facts which have been specially within his own knowledge, and of which he is the proper person to give information, by alleging that at the moment he forgot the true state of things. It is a trustee's business to know whether or not he has had notice of a prior incumbrance (*d*), a lessor's business to know whether or not he has already granted a lease (*e*). Inadvertence on the part of such persons, which leads innocent third parties to accept worthless securities on the faith of their statements, is not the ordinary negligence into which a well-meaning man may fall by occasional lack of skill or attention. It is gross and on the verge of fraud, hardly distinguishable from deliberate fraud in its character,

(*c*) Taylor *v.* Ashton (1843) 11 M. & W. 401; 12 L. J. Ex. 363; Edgington *v.* Fitzmaurice (1885) 29 Ch. Div. 459, 479, 481, cp. Smith *v.* Chadwick (1884) 9 App. Ca. at p. 190, per Lord Selborne.

(*d*) Burrowes *v.* Lock (1805) 10 Ves. 470.

(*e*) Slim *v.* Croucher (1860) 1 D. F. J. 518

and not at all distinguishable in its results. A question might be raised whether the rule is not a rule or presumption of evidence rather than of law; a man may allege that he fogot that which was within his particular knowledge and business, and so made a false report of it to another's damage with the sincere belief that he was speaking truly, but he will hardly persuade the Court to accept such an allegation (*f*). But the equivalence of *culpa lata* to *dolus* is an ancient and salutary rule of law, though particular * appli- [* 248] cations of it may be modern, and it is better not to refine upon it.

This principle seems to account for the possible, though not very probable, case of a statement being made, by a clerical blunder or the like, to convey a meaning wholly different from that which was intended (*g*). A railway company does not intend to advertise trains which have been taken off, but it may happen that by negligence the tables are not corrected (*h*). Material qualifying words, or even a downright negative, may be omitted by a printer's error, without obvious correction from the context. In such cases it would seem that gross negligence is equivalent to wrongful intention, but failure to use all possible caution—unless in circumstances imposing a special duty—is not.

Intention of the statement.

(c) It is not a necessary condition of liability that the misrepresentation complained of should have been made directly to the plaintiff, or that the defendant should have intended or desired any harm to come to him. It is enough that the representation was intended for him to act upon, and that he has acted in the manner contemplated, and suffered damage which was a natural and probable consequence. If the seller of a gun asserts that it is the work of a well-known maker and safe to use, that, as between him and the buyer, is a warranty, and the buyer has a complete remedy in contract if the assertion is found untrue; and this will generally be his better remedy, as he need not then allege or prove anything about the defendant's knowledge; but he may none the less treat the warranty, if it be fraudulent, as a substantive ground of action in tort. If the buyer wants the gun * not for his own [* 249] use, but for the use of a son to whom he means to give

(*f*) Compare the different forms of statement used by Lord Chelmsford and Lord Cranworth, p. 244, above.

(*g*) See per Lord Blackburn, 9 App. Ca. 201.

(*h*) See Denton *v.* G. N. R. Co., p. 250, below.

it, and the seller knows this, the seller's assertion is a representation on which he intends or expects the buyer's son to act. And if the seller has wilfully or recklessly asserted that which is false, and the gun, being in fact of inferior and unsafe manufacture, bursts in the hands of the purchaser's son and wounds him, the seller is liable to that son, not on his warranty (for there is no contract between them, and no consideration for any), but for a deceit (*i*). He meant no other wrong than obtaining a better price than the gun was worth; probably he hoped it would be good enough not to burst, though not so good as he said it was; but he has put another in danger of life and limb by his falsehood, and he must abide the risk. We have to follow the authorities yet farther.

Representations to a class of persons: Polhill *v.* Walter.

A statement circulated or published in order to be acted on by a certain class of persons, or at the pleasure of any one to whose hands it may come, is deemed to be made to that person who acts upon it, though he may be wholly unknown to the issuer of the statement. A bill is presented for acceptance at a merchant's office. He is not there, but a friend, not his partner or agent, who does his own business at the same place, is on the spot, and, assuming without inquiry that the bill is drawn and presented in the regular course of business, takes upon himself to accept the bill as agent for the drawee. Thereby he represents to every one who may become a holder of the bill in due course that he has authority to accept; and if he has in fact no authority, and his acceptance is not ratified by the nominal principal, he is liable to an action for deceit, though he may have thought his conduct was for the [* 250] * benefit of all parties, and expected that the acceptance would be ratified (*k*).

Denton *v.* G. N. R. Co.

Again the current time-table of a railway company is a representation to persons meaning to travel by the company's trains that the company will use reasonable diligence to despatch trains at or about the stated times for the stated places. If a train which has been taken off is announced as still running, this is a false representation, and (belief in its truth on the part of the company's servants being out of the question) a person

(*i*) Langridge *v.* Levy (1837) 2 M. & W. 519: affirmed (very briefly) in Ex. Ch. 4 M. & W. 338.

(*k*) Polhill *v.* Walter (1832) 3 B. & Ad. 114. The more recent doctrine of implied warranty was then unknown.

who by relying on it has missed an appointment and incurred loss may have an action for deceit against the company (*l*). Here there is no fraudulent intention. The default is really a negligent omission; a page of the tables should have been cancelled, or an erratum-slip added. And the negligence could hardly be called gross, but for the manifest importance to the public of accuracy in these announcements.

Peek v. Gurney.

Again the prospectus of a new company, so far forth as it alleges matters of fact concerning the position and prospects of the undertaking, is a representation addressed to all persons who may apply for shares in the company; but it is not deemed to be addressed to persons who after the establishment of the company become purchasers of shares at one or more removes from the original holders (*ll*), for the office of the prospectus is exhausted when once the * shares are al- [* 251] lotted. As regards those to whom it is addressed, it matters not whether the promoters wilfully use misleading language or not, or do or do not expect that the undertaking will ultimately be successful. The material question is, "Was there or was there not misrepresentation in point of fact?" (*m*). Innocent or benevolent motives do not justify an unlawful intention in law, though they are too often allowed to do so in popular morality.

Reliance on the representation.

(d) As to the plaintiff's action on the faith of the defendant's representation.

A. by words or acts represents to B. that a certain state of things exists, in order to induce B. to act in a certain way. The simplest case is where B., relying wholly on A.'s statement, and having no other source of information, acts in the manner contemplated. This needs no further comment. The case of B. disbelieving and rejecting A.'s assertion is equally simple.

Another case is that A.'s representation is never communicated to B. Here, though A. may have intended to deceive B., it is plain that he has not deceived him;

(*l*) So held unanimously in Denton *v.* G. N. R. Co. (1856) 5 E. & B. 860; 25 L. J. Q. B. 129. Lord Campbell C. J., and Wightman J., held (*dubit.* Crompton J.) that there was also a cause of action in contract. The difficulty often felt about maintaining an action for deceit against a corporation does not seem to have occurred to any member of the Court.

(*ll*) Peek *v.* Gurney (1873) L. R. 6 H. L. 377, 400, 411.

(*m*) Lord Cairns, L. R. 6 H. L., at p. 409. Cp. per Lord Blackburn, Smith *v.* Chadwick, 10 App. Ca. at p. 201.

and an unsuccessful attempt to deceive, however unrighteous it may be, does not cause damage, and is not an actionable wrong. A fraudulent seller of defective goods who patches up a flaw for the purpose of deceiving an inspection cannot be said to have thereby deceived a buyer who omits to make any inspection at all. We should say this was an obvious proposition, if it had [* 252] not been judicially doubted (*n*). * The buyer may be protected by a condition or warranty, express or implied by law from the nature of the particular transaction; but he cannot complain of a merely potential fraud directed against precautions which he did not use. A false witness who is in readiness but is not called is a bad man, but he does not commit perjury.

Means of knowledge immaterial without actual independent inquiry.

Yet another case is that the plaintiff has at hand the means of testing the defendant's statement, indicated by the defendant himself, or otherwise within the plaintiff's power, and either does not use them or uses them in a partial and imperfect manner. Here it seems plausible at first sight to contend that a man who does not use obvious means of verifying the representations made to him does not deserve to be compensated for any loss he may incur by relying on them without inquiry. But the ground of this kind of redress is not the merit of the plaintiff, but the demerit of the defendant: and it is now settled law that one who chooses to make positive assertions without warrant shall not excuse himself by saying that the other party need not have relied upon them. He must show that his representation was not in fact relied upon. In the same spirit it is now understood (as we shall see in due place) that the defence of contributory negligence does not mean that the plaintiff is to be punished for his want of caution, but that an act or default of his own, and not the negligence of the defendant, was the proximate cause of his damage. If the seller of a business fraudulently overstates the amount of the business and returns, and thereby obtains an excessive price, he is liable to an action for deceit at the suit of the buyer, although the books were accessible to the buyer before the sale was concluded (*nn*).

(*n*) Horsfall *v.* Thomas (1862) 1 H. & C. 90; 31 L. J. Ex. 322, a case of contract, so that *a fortiori* an action for deceit would not lie: dissented from by Cockburn C. J., L. R. 6 Q. B. at p. 605. The case was a peculiar one, but could not have been otherwise decided.

(*nn*) Dobell *v.* Stevens (1825) 3 B. & C. 623.

Perfunctory inquiry will not do.

And the same principle applies as long as [* 253] the party substantially puts his trust in the representation made to him, even if he does use some observation of his own.

A cursory view of a house asserted by the vendor to be in good repair does not preclude the purchaser from complaining of substantial defects in repair which he afterwards discovers. "The purchaser is induced to make a less accurate examination by the representation, which he had a right to believe" (*o*). The buyer of a business is not deprived of redress for misrepresentation of the amount of profits, because he has seen or held in his hand a bundle of papers alleged to contain the entries showing those profits (*p*). An original shareholder in a company who was induced to apply for his shares by exaggerated and untrue statements in the prospectus is not less entitled to relief because facts negativing those statements are disclosed by documents referred to in the prospectus, which he might have seen by applying at the company's office (*q*).

In short, nothing will excuse a culpable misrepresentation short of proof that it was not relied on, either because the other party knew the truth, or because he relied wholly on his own investigation, or because the alleged fact did not influence his action at all. And the burden of this proof is on the person who has been proved guilty of material misrepresentation (*r*). He may prove any of these things if he can. It is not an absolute proposition of law * that one who, [* 254] having a certain allegation before him, acts as belief in that allegation would naturally induce a man to act, is deemed to have acted on the faith of that allegation. It is an inference of fact, and may be excluded by contrary proof. But the inference is often irresistible (*s*).

Ambiguous statements.

Difficulties may arise on the construction of the statement alleged to be deceitful. Of course a man is responsible for the obvious meaning of his assertions;

(*o*) Dyer *v.* Hargrave (1805) 10 Ves. at p. 510 (cross suits for specific performance and compensation).

(*p*) Redgrave *v.* Hurd (1881) 20 Ch. Div. 1 (action for specific performance, counterclaim for rescission and damages).

(*q*) Central R. Co. of Venezuela *v.* Kisch (1867) L. R. 2 H L. 99, 120, per Lord Chelmsford. A case of this kind alone would not prove the rule as a general one, promoters of a company being under a special duty of full disclosure.

(*r*) See especially per Jessel M. R. 20 Ch. Div. 21.

(*s*) See per Lord Blackburn, Smith *v.* Chadwick, 9 App. Ca. at p. 196.

but where the meaning is obscure, it is for the party complaining to show that he relied upon the words in a sense in which they were false and misleading, and of which they were fairly capable (*t*). As most persons take the first construction of obscure words which happens to strike them for the obviously right and only reasonable construction, there must always be room for perplexity in questions of this kind. Even judicial minds will differ widely upon such points, after full discussion and consideration of the various constructions proposed (*u*).

Lord Tenterden's Act.

(e) It has already been observed in general that a false representation may at the same time be a promise or term of a contract. In particular it may be such as to amount to, or to be in the nature of, a guaranty. Now by the Statute of Frauds a guaranty cannot be sued on as a promise unless it is in writing and signed by the party to be charged or his agent. If an oral [* 255] guaranty could be * sued on in tort by treating it as a fraudulent affirmation instead of a promise, the statute might be largely evaded. Such actions, in fact, were a novelty a century and a quarter after the statute had been passed (*x*), much less were they foreseen at the time. It was pointed out, after the modern action for deceit was established, that the jurisdiction thus created was of dangerous latitude (*y*); and, at a time when the parties could not be witnesses in a court of common law, the objection had much force. By Lord Tenterden's Act, as it is commonly called (*z*), the following provision was made:—

"No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon

(*t*) Smith *v.* Chadwick (1884) 9 App. Ca. 187, especially Lord Blackburn's opinion.

(*u*) In the case last cited (1881–2) (Fry J., and C. A. 20 Ch. Div. 27), Fry J. and Lord Bramwell decidedly adopted one construction of a particular statement; Lindley L. J., the same, though less decidedly, and Cotton L. J., another, while Jessel M. R., Lord Selborne, Lord Blackburn, and Lord Watson thought it ambiguous.

(*x*) See the dissenting judgment of Grose J. in Pasley *v.* Freeman (1789) 3 T. R. 51, and 2 Sm. L. C.

(*y*) By Lord Eldon in Evans *v.* Bicknell (1801) 6 Ves. 174, 182, 186.

(*z*) 9 Geo. 4, c. 14, s. 6.

(*a*), unless such representation or assurance be made in writing, signed by the party to be charged therewith."

This is something more stringent than the Statute of Frauds, for nothing is said, as in that statute, about the signature of a person "thereunto lawfully authorized," and it has been decided that signature by an agent will not do (*b*). Some doubt exists whether the word "ability" does or does not extend the enactment to cases where the representation is not in the nature of a guaranty at all, but an * affirmation about [* 256] some specific circumstance in a person's affairs. The better opinion seems to be that only statements really going to an assurance of personal credit are within the statute (*bb*). Such a statement is not the less within it, however, because it includes the allegation of a specific collateral circumstance as a reason (*c*).

Quære as to the law under the Judicature Acts.

A more serious doubt is whether the enactment be now practically operative in England. The word "action" of course did not include a suit in equity at the date of the Act, and the High Court has succeeded to all (and in some points more than all) the equitable jurisdiction and powers of the Court of Chancery. But that court would not in a case of fraud, however undoubted its jurisdiction, act on the plaintiff's oath against the defendant's, without the corroboration of documents or other material facts; and it would seem that in every case of this kind where the Court of Chancery had concurrent jurisdiction with the courts of common law (and it is difficult to assign any where it had not), Lord Tenterden's Act is now superseded by this rule of evidence or judicial prudence.

Misrepresentations made by agents.

There still remain the questions which arise in the case of a false representation made by an agent on account of his principal. Bearing in mind that reckless ignorance is equivalent to guilty knowledge, we may state the alternatives to be considered as follows:—

The principal knows the representation to be false

(*a*) *Sic.* It is believed that the word "credit" was accidentally transposed, so that the true reading would be "obtain money or goods upon credit:" see Lyde *v.* Barnard (1836) 1 M. & W. 101, per Parke B. Other conjectural emendations are suggested in his judgment and that of Lord Abinger.

(*b*) Swift *v.* Jewsbury (1874) Ex. Ch. L. R. 9 Q. B. 301.

(*bb*) Parke and Alderson BB. in Lyde *v.* Barnard (1836) *supra: contra* Lord Abinger C. B. and Gurney B.

(*c*) Swan *v.* Phillips (1838) 8 A. & E. 457.

and authorizes the making of it. Here the principal is clearly liable; the agent is or is not liable according as he does not or does himself believe the representation to be true.

[* 257] * The principal knows the contrary of the representation to be true, and it is made by the agent in the general course of his employment but without specific authority.

Here, if the agent does not believe his representation to be true, he commits a fraud in the course of his employment and for the principal's purposes, and, according to the general rule of liability for the acts and defaults of an agent, the principal is liable (*d*).

If the agent does believe the representation to be true, there is a difficulty; for the agent has not done any wrong and the principal has not authorized any. Yet the other party's damage is the same. That he may rescind the contract, if he has been misled into a contract, may now be taken as settled law (*e*). But what if there was not any contract, or rescission has become impossible? Has he a distinct ground of action, and if so how? Shall we say that the agent had apparent authority to pledge the belief of his principal, and therefore the principal is liable? in other words, that the principal holds out the agent as having not only authority but sufficient information to enable third persons to deal with the agent as they would with the principal? Or shall we say, less artificially, that it is gross negligence to withhold from the agent information so material that for want of it he is likely to mislead third persons dealing with the principal through him, and such negligence is justly deemed equivalent to fraud? Such a thing may certainly be done with [* 258] * fraudulent purpose, in the hope that the agent will, by a statement imperfect or erroneous in that very particular, though not so to his knowledge, deceive the other party. Now this would beyond question be actual fraud in the principal, with the ordinary conse-

---

(*d*) Parke B. 6 M. & W. 373.

(*e*) See Principles of Contract, 530. In Cornfoot *v.* Fowke, 6 M. & W. 358, it is difficult to suppose that as a matter of fact the agent's assertion can have been otherwise than reckless: what was actually decided was that it was misdirection to tell the jury without qualification "that the representation made by the agent must have the same effect as if made by the plaintiff himself:" the defendant's plea averring fraud without qualification.

quences (*f*). If the same thing happens by inadvertence, it seems inconvenient to treat such inadvertence as venial, or exempt it from the like consequences. We think, therefore, that an action lies against the principal; whether properly to be described, under common law forms of pleading, as an action for deceit, or as an analogous but special action on the case, there is no occasion to consider.

On the other hand an honest and prudent agent may say, "To the best of my own belief such and such is the case," adding in express terms or by other clear indication—"but I have no information from my principal." Here there is no ground for complaint, the other party being fairly put on inquiry.

Liability of corporations herein.

If the principal does not expressly authorize the representation, and does not know the contrary to be true, but the agent does, the representation being in a matter within the general scope of his authority, the principal is liable as he would be for any other wrongful act of an agent about his business. And as this liability is not founded on any personal default in the principal, it equally holds when the principal is a corporation (*g*). It has been suggested, but * never [* 259] decided, that it is limited to the amount by which the principal has profited through the agent's fraud. The Judicial Committee have held a principal liable who got no profit at all (*h*).

But it seems to be still arguable that the proposed limitation holds in the case of the defendant being a corporation (*i*), though it has been disregarded in at least one comparatively early decision of an English superior court, the bearing of which on this point has appar-

---

(*f*) Admitted by all the Barons in Cornfoot *v.* Fowke; Parke B. M. & W. at pp. 362, 374, Rolfe at p. 370, Alderson at p. 372. The broader view of Lord Abinger's dissenting judgment of course includes this.

(*g*) Barwick *v.* English Joint Stock Bank (1867) Ex. Ch. L. R. 2 Ex. 259; Mackay *v.* Commercial Bank of New Brunswick (1874) L. R. 5 P. C. 394; Swire *v.* Francis (1877) 3 App. Ca. 106 (J. C.); Houldsworth *v.* City of Glasgow Bank (1880) Sc. 5 App. Ca. 317. See p. 82, above.

(*h*) Swire *v.* Francis, last note.

(*i*) Lord Cranworth in Western Bank of Scotland *v.* Addie (1867) L. R. 1 Sc. & D. at pp. 166, 167. Lord Chelmsford's language is much more guarded.

ently been overlooked (*k*). Ulpian, on the other hand, may be cited in its favour (*l*).

Reason of an apparently hard law.

The hardest case that can be put for the principal, and by no means an impossible one, is that the principal authorizes a specific statement which he believes to be true, and which at the time of giving the authority is true; before the agent has executed his authority the facts are materially changed to the knowledge of the agent, but unknown to the principal; the agent conceals this from the principal, and makes the statement as originally authorized. But the case is no harder than [* 260] that of a manufacturer or carrier * who finds himself exposed to heavy damages at the suit of an utter stranger by reason of the negligence of a servant, although he has used all diligence in choosing his servants and providing for the careful direction of their work. The necessary and sufficient condition of the master's responsibility is that the act or default of the servant or agent belonged to the class of acts which he was put in the master's place to do, and was committed for the master's purposes. And "no sensible distinction can be drawn between the case of fraud and the case of any other wrong." The authority of Barwick *v.* English Joint Stock Bank (*m*) is believed, notwithstanding the doubts still sometimes expressed, to be conclusive.

II.—*Slander of Title.*

Slander of title.

The wrong called Slander of Title is in truth a special variety of deceit, which differs from the ordinary type in that third persons, not the plaintiff himself, are

(*k*) Denton *v.* G. N. R. Co (1856) p. 250, above. No case could be stronger, for (1) the defendant was a corporation; (2) there was no active or intentional falsehood, but the mere negligent continuance of the announcement no longer true; (3) the corporation derived no profit. The point, however, was not discussed.

(*l*) D. 4. 3, de dolo malo. 15 § 1. Sed an in municipes de dolo detur actio, dubitatur. Et puto ex suo quidem dolo non posse dari, quid enim municipes dolo facere possunt? Sed si quid ad eos pervenit ex dolo eorum qui res eorum administrant, puto dandam. The Roman lawyers adhered more closely to the original conception of moral fraud as the ground of action than our courts have done. The *actio de dolo* was *famosa*, and was never an alternative remedy, but lay only when there was no other (si de his rebus alia actio non erit), D. *h. t.* 1.

(*m*) L. R. 2 Ex. 259, 265.

induced by the defendant's falsehood to act in a manner causing damage to the plaintiff. Notwithstanding the current name, an action for this cause is not like an action for ordinary defamation; it is "an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title" (*n*). Also the wrong is a malicious one in the only proper sense of the word, that is, absence of good faith is an essential condition of liability (*o*); or actual malice, no less than special damage, is of the gist of the action.

Recent extensions of the prineiple.

* This kind of action is not frequent. For- [* 261] merly it appears to have been applied only to statements in disparagement of the plaintiff's title to real property. It is now understood that the same reason applies to the protection of title to chattels, and of exclusive interests analogous to property, though not property in the strict sense, like patent rights and copyright. But an assertion of title made by way of self-defence or warning in any of these matters is not actionable, though the claim be mistaken, if it is made in good faith (*p*). In America the law has been extended to the protection of inchoate interests under an agreement. If A. has agreed to sell certain chattels to B., and C. by sending to A. a false telegram in the name of B., or by other wilfully false representation, induces A. to believe that B. does not want the goods, and to sell to C. instead, B. has an action against C. for the resulting loss to him, and it is held to make no difference that the original agreement was not enforceable for want of satisfying the Statute of Frauds (*q*).

A disparaging statement concerning a man's title to use an invention, design, or trade name, or his conduct in the matter of a contract, may amount to a libel or slander on him in the way of his business: in other words the special wrong of slander of title may be included in defamation, but it is evidently better for the

(*n*) Tindal C. J., Malachy *v.* Soper (1836) 3 Bing. N. C. 371; Bigelow L. C. 42, 52.

(*o*) Halsey *v.* Brotherhood (1881) 19 Ch. Div. 386, confirming previous authorities.

(*p*) Wren *v.* Weild (1869) L. R. 4 Q. B. 730; Halsey *v.* Brotherhood, *supra* (patent; in Wren *v.* Wield the action is said to be of a new kind, but sustainable with proof of malice); Steward *v.* Young (1870) L. R. 5 C. P. 122 (title to goods); Dicks *v.* Brooks (1880) 15 Ch. D. 22 (copyright in design), see 19 Ch. D. 391.

(*q*) Benton *v.* Pratt (1829) 2 Wend. 385; Rice *v.* Manley (1876) 66 N. Y. (21 Sickels) 82.

plaintiff to rely on the general law of defamation if he can, as thus he escapes the troublesome burden of proving malice (*r*).

[* 262] * It has been held in Massachusetts that if A. has exclusive privileges under a contract with B., and X. by purposely misleading statements or signs induces the public to believe that X. has the same rights, and thereby diverts custom from A., X. is liable to an action at the suit of A. (*s*). In that case the defendants, who were coach owners, used the name of a hotel on their coaches and the drivers' caps, so as to suggest that they were authorized and employed by the hotelkeeper to ply between the hotel and the railway station; and there was some evidence of express statements by the defendants' servants that their coach was "the regular coach." The plaintiffs were the coach owners in fact authorized and employed by the hotel. The Court said that the defendants were free to compete with the plaintiffs for the carriage of passengers and goods to that hotel, and to advertise their intention of so doing in any honest way; but they must not falsely hold themselves out as having the patronage of the hotel, and there was evidence on which a jury might well find such holding out as a fact. The case forms, by the nature of its facts, a somewhat curious link between the general law of false representation and the special rules as to the infringement of rights to a trade mark or trade name (*t*). No English case much like it has been met with: its peculiarity is that no title to any property or to a defined legal right was in question. The hotelkeeper could not give a monopoly, but only a sort of preferential comity. But this is practically a valuable privilege in the nature of goodwill, and equally capable of being legally recognized and protected against [* 263] * fraudulent infringement. Goodwill in the accustomed sense does not need the same kind of protection, since it exists by virtue of some express contract which affords a more convenient remedy. Some years ago an attempt was made, by way of analogy to slander of title, to set up an exclusive right to the name

---

(*r*) See Thorley's Cattle Food Co. *v.* Massam (1879) 14 Ch. Div. 763; Dicks *v.* Brooks, last note but one.

(*s*) Marsh *v.* Billings (1851) 7 Cush. 322, and Bigelow L. C. 59.

(*t*) The instructions given at the trial (Bigelow L. C. at p. 63) were held to have drawn too sharp a distinction, and to have laid down too narrow a measure of damages, and a new trial was ordered. It was also said that actual damage need not be proved, *sed qu.*

of a house on behalf of the owner as against an adjacent owner. Such a right is not known to the law (*u*).

Trade marks and trade names

The protection of trade marks and trade names was orginally undertaken by the courts on the ground of preventing fraud (*v*). But the right to a trade mark, after being more and more assimilated to proprietary rights (*x*), has become a statutory franchise analogous to patent rights and copyright (*y*); and in the case of a trade name, although the use of a similar name cannot be complained of unless it is shown to have a tendency to deceive customers, yet the tendency is enough; the plaintiff is not bound to prove any fraudulent intention or even negligence against the defendant (*z*). The wrong to be redressed is conceived no longer as a species of fraud, but as being to an incorporeal franchise what trespass is to the possession, or right to possession, of the corporeal subjects of property. We therefore do not pursue the topic here.

---

* III.—*Malicious Prosecution and Abuse of Process.* [* 264]

Malicious prosecution.

We have here one of the few cases in which proof of evil motive is required to complete an actionable wrong. "In an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the judge inconsistent with the existence of reasonable and probable cause (*a*); and lastly, that the proceedings of which he

(*u*) Day *v.* Brownrigg (1878) (reversing Malins V.-C.) 10 Ch. Div. 294.

(*v*) See per Lord Blackburn, 8 App. Ca. at p. 29; Lord Westbury L. R. 5 H. L. at p. 522; Mellish L. J. 2 Ch. D. at p. 453.

(*x*) Singer Manufacturing Co. *v.* Wilson (1876) 2 Ch. D. 434, per Jessel M. R. at pp. 441–2; James L. J. at p. 451; Mellish L. J. at p. 544.

(*y*) Patents, Designs, and Trade Marks Act, 1883, 46 & 47 Vict. c. 57.

(*z*) Hendriks *v.* Montagu (1881) 17 Ch. Div. 638; Singer Manufacturing Co. *v.* Loog (1882) 8 App. Ca. 15.

(*a*) The facts have to be found by the jury, but the inference that on those facts there was or was not reasonable and probable cause is not for the jury but for the Court; cp. the authorities on false imprisonment, pp. 188—193, above.

complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice" (*b*). And the plaintiff's case fails if his proof fails at any one of these points. So the law has been defined by a recent judgment of the Court of Appeal, confirmed by the House of Lords. It seems needless for the purposes of this work to add illustrations from earlier authorities.

As in the case of deceit, and for similar reasons, it has been doubted whether an action for malicious prosecution will lie against a corporation. It seems, on principle, that such an action will lie if the wrongful act was done by a servant of the corporation in the course of his employment and in the company's supposed interest, and it has been so held (*c*), but there are dicta to the contrary (*d*), and in particular a recent emphatic opin- [* 265] ion of Lord * Bramwell's (*e*), which, however, as pointed out by some of his colleagues at the time (*f*), was extra-judicial.

Malicious civil proceedings.

Generally speaking, it is not an actionable wrong to institute civil proceedings without reasonable and probable cause, even if malice be proved. For in contemplation of law the defendant who is unreasonably sued is sufficiently indemnified by a judgment in his favour which gives him his costs against the plaintiff (*g*). And special damage beyond the expense to which he has been put cannot well be so connected with the suit as a natural and probable consequence that the unrighteous plaintiff, on the ordinary principles of liability for indirect consequences, will be answerable for them (*h*). "In the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable

(*b*) Bowen L. J., Abrath *v.* N. E. R. Co. (1883) 11 Q. B. Div. 440, 455: the decision of the Court of Appeal was affirmed in H. L. (1886) 11 App. Ca. 247.

(*c*) Edwards *v.* Midland Rail. Co. (1880) 6 Q. B. D. 287, Fry J.

(*d*) See the judgment in the case last cited.

(*e*) 11 App. Ca. at p. 250.

(*f*) Lord Fitzgerald; 11 App. Ca. at p. 244; Lord Selborne at p. 256.

(*g*) It is common knowledge that the costs allowed in an action are hardly ever a real indemnity. The true reason is that litigation must end somewhere. If A. may sue B. for bringing a vexatious action, then, if A. fails to persuade the Court that B.'s original suit was vexatious, B. may again sue A. for bringing this latter action, and so *ad infinitum*.

(*h*) See the full exposition in the Court of Appeal in Quartz Hill Gold Mining Co. *v.* Eyre (1883) 11 Q. B. Div. 674, especially the judgment of Bowen L. J.

and probable cause, will not support a subsequent action for malicious prosecution" (*i*).

But there are proceedings which, though civil, are not ordinary actions, and fall within the reason of the law which allows an action to lie for the malicious prosecution * of a criminal charge. That rea- [* 266] son is that prosecution on a charge "involving either scandal to reputation, or the possible loss of liberty to the person" (*j*), necessarily and manifestly imports damage. Now the commencement of proceedings in bankruptcy against a trader, or the analogous process of a petition to wind up a company, is in itself a blow struck at the credit of the person or company whose affairs are thus brought in question. Therefore such a proceeding, if instituted without reasonable and probable cause and with malice, is an actionable wrong (*k*). Other similar exceptional cases were possible so long as there were forms of civil process commencing with personal attachment; but such procedure has not now any place in our system; and the rule that in an ordinary way a fresh action does not lie for suing a civil action without cause has been settled and accepted for a much longer time (*l*). In common law jurisdictions where a suit can be commenced by arrest of the defendant or attachment of his property, the old authorities and distinctions may still be material (*m*). The principles are the same as in actions for malicious prosecution, *mutatis mutandis:* thus an action for maliciously procuring the plaintiff to be adjudicated a bankrupt will not lie unless and until the adjudication has been set aside (*n*).

Probably an action will lie for bringing and pros-

(*i*) Bowen L. J. 11 Q. B. D. at p. 690. There has been a contrary decision in Vermont: Closson *v.* Staples (1869) 42 Vt. 209; 1 Am. Rep. 316. We do not think it is generally accepted in other jurisdictions; it is certainly in accordance with the opinion expressed by Butler in his notes to Co. Lit. 161 *a*, but Butler does not attend to the distinction by which the authorities he relies on are explained.

(*j*) 11 Q. B. D. 691.

(*k*) Quartz Hill Gold Mining Co. *v.* Eyre (1883) *supra*. The contrary opinions expressed in Johnson *v.* Emerson (1871) L. R. 6 Ex. 329, with reference to proceedings under the Bankruptcy Act of 1869, are disapproved: under the old bankruptcy law it was well settled that an action might be brought for malicious proceedings.

(*l*) Savile or Savill *v.* Roberts (1698) 1 Ld. Raym. 374, 379; 12 Mod. 208, 210, and also in 5 Mod., Salkeld, and Carthew.

(*m*) See Cooley on Torts, 187. As to British India, see Raj Chunder Roy *v.* Shama Soondari Debi, 1. L. R. 4 Cal. 583.

(*n*) Metropolitan Bank *v.* Pooley (1885) 10 App. Ca. 210.

[* 267] ecuting * an action in the name of a third person maliciously (which must mean from ill-will to the defendant in the action, and without an honest belief that the proceedings are or will be authorized by the nominal plaintiff), and without reasonable or probable cause, whereby the party against whom that action is brought sustains damage; but certainly such an action does not lie without actual damage (o).

IV.—*Other Malicious Wrongs.*

Conspiracy.

The modern action for malicious prosecution has taken the place of the old writ of conspiracy and the action on the case grounded thereon (*p*), out of which it seems to have developed. Whether conspiracy is known to the law as a substantive wrong, or in others words whether two or more persons can ever be joint wrongdoers, and liable to an action as such, by doing in execution of a previous agreement something it would not have been unlawful for them to do without such agreement, is a question of mixed history and speculation not wholly free from doubt. It seems to be the better opinion that the conspiracy or "confederation" is not in any case the gist of the action, but is only matter of inducement or evidence. Either the wrongful acts by which the plaintiff has suffered were such as one person could not commit alone, say a riot, or they were wrongful because malicious, and the malice is proved by showing that they were done in execution of a concerted design. In the singular case of Gregory *v.* Duke of Brunswick (*q*) the action was in effect for hissing the [* 268] plaintiff * off the stage of a theatre in pursuance of a malicious conspiracy between the defendants. The Court were of opinion that in point of law the conspiracy was material only as evidence of malice, but that in point of fact there was no other such evidence, and therefore the jury were rightly directed that without proof of it the plaintiff's case must fail.

"It may be true, in point of law, that, on the declaration as framed, one defendant might be convicted though the other were acquitted; but whether, as a matter of fact, the plaintiff could entitle himself to a verdict against one alone, is a very different question.

(*o*) Cotterell *v.* Jones (1851) 11 C. B. 713; 21 L. J. C. P. 2.

(*p*) F. N. B. 114 D. *sqq.*

(*q*) 6 Man. & Gr. 205, 953 (1844). The defendants justified in a plea which has the merit of being amusing.

It is to be borne in mind that the act of hissing in a public theatre is, *prima facie*, a lawful act; and even if it should be conceded that such an act, though done without concert with others, if done from a malicious motive, might furnish a ground of action, yet it would be very difficult to infer such a motive from the insulated acts of one person unconnected with others. Whether, on the facts capable of proof, such a case of malice could be made out against one of the defendants, as, apart from any combination between the two, would warrant the expectation of a verdict against the one alone, was for the consideration of the plaintiff's counsel; and, when he thought proper to rest his case wholly on proof of conspiracy, we think the judge was well warranted in treating the case as one in which, unless the conspiracy were established, there was no ground for saying that the plaintiff was entitled to a verdict; and it would have been unfair towards the defendants to submit it to the jury as a case against one of the defendants to the exclusion of the other, when the attention of their counsel had never been called to that view of the case, nor had any opportunity [been?] given them to advert to or to answer it. The case proved was, in fact, a case of conspiracy, or it was no * case at all on which the jury could properly [* 269] find a verdict for the plaintiff" (*r*).

Soon after this case was dealt with by the Court of Common Pleas in England, the Supreme Court of New York laid it down (not without examination of the earlier authorities) that conspiracy is not in itself a cause of action (*s*). The question does not appear likely to become a practical one again in this country, unless it should be raised by some adventurous plaintiff in person, with the usual result of such adventures.

Malicious interference with one's occupation,

There may be other malicious injuries not capable of more specific definition "where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood"; as where the plaintiff is owner of a decoy for catching wild fowl, and the defendant, without entering on the plaintiff's land, wilfully fires off guns near to the decoy, and frightens wild fowl away from it (*t*). Not many examples of the kind are to be

(*r*) Per Coltman J. 6 Man. & Gr. at p. 959.

(*s*) Hutchins *v.* Hutchins (1845) 7 Hill 104, and Bigelow L. C. 207. See Mr. Bigelow's note thereon.

(*t*) Carrington *v.* Taylor (1809) 11 East 571, following Keeble *v.* Hickeringill (1705) *ib.* 573 *in notis*, where see Holt's judgment.

found, and this is natural; for they have to be sought in a kind of obscure middle region where the acts complained of are neither wrongful in themselves as amounting to trespass against the plaintiff or some third person (*u*), nuisance (*v*), or breach of an absolute specific duty, nor yet exempt from search into their motives as being done in the exercise of common right in the pur- [* 270] suit of a man's lawful occupation * or the ordinary use of his property (*x*). Driving a public performer off the stage by marks of disapprobation which proceed not from an honest opinion of the demerits of his performance or person, but from private enmity, is, as we have just seen, a possible but doubtful instance (*y*). Holt put the case of a schoolmaster frightening away children from attendance at a rival school (*z*). It is really on the same principle that an action has been held to lie for maliciously (that is, with the design of injuring the plaintiff or gaining some advantage at his expense) procuring a third person to break his contract with the plaintiff, and thereby causing damage to the plaintiff (*a*). The precise extent and bearing of the doctrine are discussed in the final chapter of this book with reference to the difficulties that have been felt about it, and expressed in dissenting judgments and elsewhere. Those difficulties (we submit and shall in that place endeavour to prove) either disappear or are greatly reduced when the cause of action is considered as belonging to the class in which malice, in the sense of actual ill-will, is a necessary element.

contract,

or franchise. Generally speaking, every wilful interference with the exercise of a franchise is actionable without regard to the defendant's act being done in good faith, by reason of a mistaken notion of duty or claim of right, or being consciously wrongful. "If a man hath a franchise and is hindered in the enjoyment thereof, an action doth lie, which is an action upon the case" (*b*).

(*u*) Tarleton *v.* McGawley, Peake 270 [205]: the defendant's act in firing at negroes to prevent them from trading with the plaintiff's ship was of course unlawful *per se*.

(*v*) Cp. Ibbotson *v* Peat (1865) 3 H. & C. 644; 34 L. J. Ex. 118.

(*x*) See p. 129, above.

(*y*) Gregory *v.* Duke of Brunswick, *supra*.

(*z*) Keeble *v.* Hickeringill, *supra*.

(*a*) Lumley *v.* Gye (1853) 2 E. & B. 216; 22 L. J. Q. B. 463; Bowen *v.* Hall (1881) 6 Q. B. Div. 333.

(*b*) Holt C. J. in Ashby *v.* White, at p. 13 of the special report first printed in 1837. The action was on the case merely because trespass would not lie for the infringement of an incorporeal right.

But persons may * as public officers be in a [* 271] quasi-judicial position in which they will not be liable for an honest though mistaken exercise of discretion in rejecting a vote or the like, but will be liable for a wilful and conscious, and in that sense malicious, denial of right (*c*). In such cases the wrong, if any, belongs to the class we have just been considering.

Maintenance.

The wrong of maintenance, or aiding a party in litigation without either interest in the suit, or lawful cause of kindred, affection, or charity for aiding him, is akin to malicious prosecution and other abuses of legal process; but the ground of it is not so much an independent wrong as particular damage resulting from "a wrong founded upon a prohibition by statute"—a series of early statutes said to be in affirmation of the common law—"which makes it a criminal act and a misdemeanor" (*d*). Hence it seems that a corporation cannot be guilty of maintenance (*d*). Actions for maintenance are in modern times rare though possible (*e*); and the recent decision of the Court of Appeal that mere charity, with or without reasonable ground, is an excuse for maintaining the suit of a stranger (*f*), does not tend to encourage them.

(*c*) Tozer *v.* Child (1857) Ex. Ch. 7 E. & B. 377; 26 L. J. Q. B. 151.

(*d*) Lord Selborne, Metrop. Bank *v.* Pooley (1885) 10 App. Ca. 210, 218.

(*e*) Bradlaugh *v.* Newdegate (1883) 11 Q. B. D. 1.

(*f*) Harris *v.* Brisco (1886) 17 Q. B. Div. 504.

[* 272] * CHAPTER IX.

WRONGS TO POSSESSION AND PROPERTY.

I.—*Duties regarding Property generally.*

Absolute duty to respect others' property.

Every kind of intermeddling with anything which is the subject of property is a wrong unless it is either authorized by some person entitled to deal with the thing in that particular way, or justified by authority of law, or (in some cases but by no means generally) excusable on the ground that it is done under a reasonable though mistaken supposition of lawful title or authority. Broadly speaking, we touch the property of others at our peril, and honest mistake in acting for our own interest (*a*), or even an honest intention to act for the benefit of the true owner (*b*), will avail us nothing if we transgress.

Title, justification, excuse.

A man may be entitled in divers way to deal with property moveable or immoveable, and within a wider or narrower range. He may be an owner in possession, with indefinite rights of use and dominion, free to give or to sell, nay to waste lands or destroy chattels if such be his pleasure. He may be a possessor with rights either determined as to length of time, or undetermined though determinable, and of an extent which may vary from being hardly distinguishable from full dominion to being strictly limited to a specific purpose. [* 273] It belongs to the * law of property to tell us what are the rights of owners and possessors, and by what acts in the law they may be created, transferred, or destroyed. Again, a man may have the right of using property to a limited extent, and either to the exclusion of all other persons beside the owner or possessor, or concurrently with other persons, without himself being either owner or possessor. The definition of such

(*a*) Hollins *v.* Fowler (1875) L. R. 7 H. L. 757.

(*b*) In trespass, Kirk *v.* Gregory (1876) 1 Ex. D. 55: in trover, Hiort *v.* Bott (1874) L. R. 9 Ex. 86.

rights belongs to the part of the law of property which deals with easements and profits. Again, he may be authorized by law, for the execution of justice or for purposes of public safety and convenience, or under exceptional conditions for the true owner's benefit, to interfere with property to which he has no title and does not make any claim. We have seen somewhat of this in the chapter of "General Exceptions." Again, he may be justified by a consent of the owner or possessor which does not give him any interest in the property, but merely excuses an act, or a series of acts, that otherwise would be wrongful. Such consent is known as a licence.

Title depen-dent on contract.

Title to property, and authority to deal with property in specified ways, are commonly conferred by contract or in pursuance of some contract. Thus it oftentimes depends on the existence or on the true construction of a contract whether a right of property exists, or what is the extent of rights admitted to exist. A man obtains goods by fraud and sells them to another purchaser who buys in good faith, reasonably supposing that he is dealing with the true owner. The fraudulent re-seller may have made a contract which the original seller could have set aside, as against him, on the ground of fraud. If so, he acquires property in the goods, though a defeasible property, and the ultimate purchaser in good faith has a good title. * But the circum- [* 274] stances of the fraud may have been such that there was no true consent on the part of the first owner, no contract at all, and no right of property whatever, not so much as lawful possession, acquired by the apparent purchaser. If so, the defrauder has not any lawful interest which he can transfer even to a person acting in good faith and reasonably: and the ultimate purchaser acquires no manner of title, and notwithstanding his innocence is liable as a wrong-doer (*c*). Principles essentially similar, but affected in their application, and not unfrequently disguised, by the complexity of our law of real property, hold good of dealings with land (*d*).

Exceptional protection of certain dealings in good faith.

Acts of persons dealing in good faith with an apparent owner may be, and have been, protected in various ways and to a varying extent by different systems

(*c*) Hollins *v.* Fowler (1875) L. R. 7 H. L. 757; Cundy *v.* Lindsay (1878) 3 App. Ca. 459.

(*d*) See Pilcher *v.* Rawlins (1871) L. R. 7 Ch. 259,

of law. The purchaser from an apparent owner may acquire, as under the common-law rule of sales in market overt, a better title than his vendor had; or, by an extension in the same line, the dealings of apparently authorized agents in the way of sale or pledge may, for the security of commerce, have a special validity conferred on them, as under our Factors Acts; or one who has innocently dealt with goods which he is now unable to produce or restore specifically may be held personally excused, saving the true owner's liberty to retake the goods if he can find them, and the remedies over, if any, which may be available under a contract of sale or a warranty for the person dispossessed by the true owner. Excuse of this kind is however rarely admitted, though much the same result may sometimes be arrived at on special technical grounds.

The rights and remedies known to the common law are *possessory.*

[* 275] * It would seem that, apart from doubtful questions of title (which no system of law can wholly avoid), there ought not to be great difficulty in determining what amounts to a wrong to property, and who is the person wronged. But in fact the common law does present great difficulties; and this because its remedies were bound, until a recent date, to medieval forms, and limited by medieval conceptions. The forms of action brought not ownership but possession to the front in accordance with the habit of thought which, strange as it may now seem to us, found the utmost difficulty in conceiving rights of property as having full existence or being capable of transfer and succession unless in close connexion with the physical control of something which could be passed from hand to hand, or at least a part of it delivered in the name of the whole (*e*). An owner in possession was protected against disturbance, but the rights of an owner out of possession were obscure and weak. To this day it continues so with regard to chattels. For many purposes the " true owner " of goods is the person, and only the person, entitled to immediate possession. The term is a short and convenient one, and may be used without scruple, but on condition of being rightly understood. Regularly the common law protects ownership only through possessory rights and remedies. The reversion or reversionary interest of the freeholder or gen-

(*e*) See Mr. F. W. Maitland's articles on the " The Seisin of Chattels " and " The Mystery of Seisin," L. Q. R. i. 324, ii. 481, where divers profitable comparisons of the rules concerning real and personal property will be found.

eral owner out of possession is indeed well known to our authorities, and by conveyancers it is regarded as a present estate or interest. But when it has to be defended in a court of common law, the forms of action treat it rather as the shadow * cast before by [* 276] a right to possess at a time still to come. It has been said that there is no doctrine of possession in our law. The reason of this appearance, an appearance capable of deceiving even learned persons, is that possession has all but swallowed up ownership; and the rights of a possessor, or one entitled to possess, have all but monopolized the very name of property. There is a common phrase in our books that possession is *prima facie* evidence of title. It would be less intelligible at first sight, but not less correct, to say that in the developed system of common law pleading and procedure, as it existed down to the middle of this century, proof of title was material only as evidence of a right to possess. And it must be remembered that although forms of action are no longer with us, causes of action are what they were, and cases may still occur where it is needful to go back to the vanished form as the witness and measure of subsisting rights. The sweeping protection given to rights of property at this day is made up by a number of theoretically distinct causes of action. The disturbed possessor had his action of trespass (in some special cases replevin); if at the time of the wrong done the person entitled to possess was not in actual legal possession, his remedy was detinue, or, in the devoloped system, trover. An owner who had neither possession nor the immediate right to possession could redress himself by a special action on the case, which did not acquire any technical name.

Possession and detention.

Notwithstanding first appearances, then, the common law has a theory of possession, and a highly elaborated one. To discuss it fully would not be appropriate here (*f*); but * we have to bear in mind that it [* 277] must be known who is in legal possession of any given subject of property, and who is entitled to possess it, before we can tell what wrongs are capable of being committed, and against whom, by the person having physical control over it, or by others. Legal possession does not necessarily coincide either with actual physical control or the present power thereof (the

(*f*) A separate work on the subject, by Mr. R. S. Wright and the present writer, is in preparation and will shortly be published by the Oxford University Press.

"detention" of Continental terminology), or with the right to possess (constantly called "property" in our books); and it need not have a rightful origin. The separation of detention, possession in the strict sense, and the right to possess, is both possible and frequent. A. lends a book to B., gratuitously and not for any fixed time, and B. gives the book to his servant to carry home. Here B.'s servant has physical possession, better named custody or detention, but neither legal possession (*g*) nor the right to possess; B. has legal and rightful possession, and the right to possess as against every one but A.; while A. has not possession, but has a right to possess which he can make absolute at any moment by determining the bailment to B., and which the law regards for many purposes as if it were already absolute. As to an actual legal possession (besides and beyond mere detention) being acquired by wrong, the wrongful change of possssion was the very substance of disseisin as to land, and is still the very substance of trespass by taking and carrying away goods (*de bonis asportatis*), and as such was and is a necessary condition of the offence of larceny at common law.

The common law, when it must choose between denying legal possession to the person apparently in possession, and attributing it to a wrong-doer, generally pre- [* 278] fers the latter * course. In Roman law there is no such general tendency, though the results are often similar (*h*).

Trespass and conversion.

Trespass is the wrongful disturbance of another person's possession of land (*i*) or goods. Therefore it cannot be committed by a person who is himself in possession; though in certain exceptional cases a dispunishable or even a rightful possessor of goods may by his own act, during a continuous physical control, make himself a mere trespasser. But a possessor may do wrong in other ways. He may commit waste as to the land he holds, or he may become liable to an action

(*g*) Yet it is not certain that he could not maintain trespass against a stranger; see Moore *v.* Robinson, 2 B. & Ad. 817. The law about the custody of servants and persons in a like position has vacillated from time to time, and has never been defined as a whole.

(*h*) Cp. Holland, "Elements of Jurisprudence," 3rd ed. pp. 161–2.

(*i*) Formerly it was said that trespass to land was a disturbance not amounting to disseisin, though it might be "vicina disseisinae." Bracton, fo. 217*a*. I do not think this distinction was regarded in any later period.

of ejectment by holding over after his title or interest is determined. As to goods he may detain them without right after it has become his duty to return them, or he may convert them to his own use, a phrase of which the scope has been greatly extended in the modern law. Thus we have two kinds of duty, namely to refrain from meddling with what is lawfully possessed by another, and to refrain from abusing possession which we have lawfully gotten under a limited title; and the breach of these produces distinct kinds of wrong, having, in the old system of the common law, their distinct and appropriate remedies. But a strict observance of these distinctions in practice would have led to intolerable results, and a working margin was given by beneficent fictions which (like most indirect and gradual reforms) extended the usefulness of the law at the cost of making it intricate and difficult to understand. On the one hand the remedies of an actual possessor were freely accorded to persons who had only the right to possess (*j*); on the other * hand the person wronged was constantly al- [* 279] lowed at his option to proceed against a mere trespasser as if the trespasser had only abused a lawful or at any rate excusable possession.

Alternative remedies.

In the later history of common law pleading trepass and conversion became largely though not wholly interchangeable. Detinue, the older form of action for the recovery of chattels, was not abolished, but it was generally preferable to treat the detention as a conversion and sue in trover (*k*), so that trover practically superseded detinue, as the writ of right and the various assizes, the older and once the only proper remedies whereby a freeholder could recover possession of the land, were superseded by ejectment, a remedy at first introduced merely for the protection of leasehold interests. With all their artificial extensions these forms of action did not completely suffice. There might still be circumstances in which a special action on the case was required. And these complications cannot be said to be even now wholly obsolete. For exceptional circumstances may still occur in which it is doubtful whether

(*j*) See Smith *v.* Milles, 1 T. R. 480, and note that "constructive possession," as used in our books, includes (i.) possession exercised through a servant or licensee; (ii.) possession conferred by law, in certain cases, *e. g.* on an executor, independently of any physical apprehension or transfer; (iii.) an immediate right to possess, which is distinct from actual possession.

(*k*) Blackst. iii. 152.

an action lies without proof of actual damage, or, assuming that the plaintiff is entitled to judgment, whether that judgment shall be for the value of the goods wrongfully dealt with or only for his actual damage, which may be a nominal sum. Under such conditions we have to go back to the old forms and see what the appropriate action would have been. This is not a desirable state of the law (*l*), but while it exists we must take account of it.

[* 280] * II.—*Trespass.*

What shall be said a trespass.

Trespass may be committed by various kinds of acts, of which the most obvious are entry on another's land (trespass *quare clausum fregit*), and taking another's goods (trespass *de bonis asportatis*) (*m*). Notwithstanding that trespasses punishable in the king's court were said to be *vi et armis*, and were supposed to be punishable as a breach of the king's peace, neither the use of force, nor the breaking of an inclosure or transgression of a visible boundary, nor even an unlawful intention, is necessary to constitute an actionable trespass. It is likewise immaterial, in strictness of law, whether there be any actual damage or not. "Every invasion of private property, be it every so minute, is a trespass" (*n*). There is no doubt that if one walks across a stubble field without lawful authority or the occupier's leave, one is technically a trespasser, and it may be doubted whether persons who roam about common lands, not being in exercise of some particular right, are in a better position. It may be that, where the public enjoyment of such lands for sporting or other recreation is notorious, for example on Dartmoor (*o*), a licence (as to which more presently) would be implied. Oftentimes warnings or requests are addressed to the public to abstain from going on some specified part of open land or private ways, or from doing injurious acts. In such cases there seems to be a general licence

(*l*) See per Thesiger L. J., 4 Ex. Div. 199.

(*m*) The exact parallel to trespass *de bonis asportatis* is of course not trespass *qu. cl. fr.* simply, but trespass amounting to a disseisin of the freeholder or ouster of the tenant for years or other interest not freehold.

(*n*) Entick *v.* Carrington, 19 St. Tr. 1066. "Property" here, as constantly in our books, really means possession or a right to possession.

(*o*) As a matter of fact, the Dartmoor hunt has an express licence from the Duchy of Cornwall.

to use the land or ways in conformity with the owner's will thus expressed. But even so, * persons [* 281] using the land are no more than "bare licensees," and their rights is of the slenderest.

Quære concerning balloons.

It has been doubted whether it is a trespass to pass over land without touching the soil, as one may in a balloon, or to cause a material object, as shot fired from a gun, to pass over it. Lord Ellenborough thought it was not in itself a trespass "to interfere with the column of air superincumbent on the close," and that the remedy would be by action on the case for any actual damage: though he had no difficulty in holding that a man is a trespasser who fires a gun on his own land so that the shot fall on his neighbour's land (*p*). Fifty years later Lord Blackburn inclined to think differently (*q*), and his opinion seems the better. Clearly there can be a wrongful entry on land below the surface, as by mining, and in fact this kind of trespass is rather prominent in our modern books. It does not seem possible on the principles of the common law to assign any reason why an entry at any height above the surface should not also be a trespass. The improbability of actual damage may be an excellent practical reason for not suing a man who sails over one's land in a balloon; but this appears irrelevant to the pure legal theory. Trespasses clearly devoid of legal excuse are committed every day on the surface itself, and yet are of so harmless a kind that no reasonable occupier would or does take any notice of them. Then one can hardly doubt that it might be a nuisance, apart from any definite damage, to keep a balloon hovering over another man's land: but if it is not * a trespass in law [* 282] to have the balloon there at all, one does not see how a continuing trespass is to be committed by keeping it there. Again, it would be strange if we could object to shots being fired across our land only in the event of actual injury being caused, and the passage of the foreign body in the air above our soil being thus a mere incident in a distinct trespass to person or property. The doctrine suggested by Lord Ellenborough's dictum, if generally accepted and acted on, would so far be for the

(*p*) Pickering *v.* Rudd (1815) 4 Camp. 219, 221.

(*q*) Kenyon *v.* Hart (1865) 6 B. & S. 249, 252; 34 L. J. M. C. 87; and see per Fry L. J. in Wandsworth Board of Works *v.* United Telephone Co. (1884) 13 Q. B. Div. 904, 927. It may be otherwise, as in that case, where statutory interests in land are conferred for special purposes.

benefit of the public service that the existence of a right of "innocent passage" for projectiles over the heads and lands of the Queen's subjects would increase the somewhat limited facilities of the land forces for musketry and artillery practice at long ranges. But we are not aware that such a right has in fact been claimed or exercised.

Trespass by a man's cattle is dealt with exactly like trespass by himself; but in the modern view of the law this is only part of a more general rule or body of rules imposing an exceptionally strict and unqualified duty of safe custody on grounds of public expediency. In that connexion we shall accordingly return to the subject (*r*).

Trespass to goods.

Trespass to goods may be committed by taking possession of them, or by any other act "in itself immediately injurious" to the goods in respect of the possessor's interest (*s*), as by killing (*t*), beating (*u*), or chasing (*x*) animals, or defacing a work of art. Where the possession is changed the trespass is an *asportation* [* 283] (from the old form * of pleading, *cepit et asportavit* for inanimate chattels, *abduxit* for animals), and may amount to the offence of theft. Other trespasses to goods may be criminal offences under the head of malicious injury to property. The current but doubtful doctrine of the civil trespass being "merged in the felony" when the trespass is felonious has been considered in an earlier chapter (*y*). Authority, so far as known to the present writer, does not clearly show whether it is in strictness a trespass merely to lay hands on another's chattel without either dispossession or actual damage. By the analogy of trespass to land it seems that it must be so. There is no doubt that the least actual damage would be enough (*z*). And cases are conceivable in which the power of treating a mere unauthorized touching as a trespass might be salutary and necessary, as where valuable objects are exhibited in

(*r*) Chap. XII. below.

(*s*) Blackst. iii. 153.

(*t*) Wright *v.* Ramscot, 1 Saund. 83; 1 Wms. Saund. 108 (trespass for killing a mastiff).

(*u*) Dand *v.* Sexton, 3 T. R. 37 (trespass *vi et armis* for beating the plaintiff's dog).

(*x*) A form of writ is given for chasing the plaintiff's sheep with dogs, F. N. B. 90 L.; so for shearing the plaintiff's sheep, *ib.* 87 G.

(*y*) P. 172, above.

(*z*) "Scratching the panel of a carriage would be a trespass," Alderson B. in Fouldes *v.* Willoughby, 8 M. & W. 549.

places either public or open to a large class of persons. In the old precedents trespass to goods hardly occurs except in conjunction with trespass to land (*a*).

III.—*Injuries to Reversion.*

Wrongs to an owner not in possession.

A person in possession of property may do wrong by refusing to deliver possession to a person entitled, or by otherwise assuming to deal with the property as owner or adversely to the true owner, or by dealing with it under colour of his real possessory title but in excess of his rights, or, where the nature of the object admits of it, by acts amounting to destruction or total change of character, such as breaking up land by opening mines, burning *wood, grinding corn, or spinning [* 284] cotton into yarn, which acts however are only the extreme exercise of assumed dominion. The law started from entirely distinct conceptions of the mere detaining of property from the person entitled, and the spoiling or altering it to the prejudice of one in reversion or remainder, or a general owner (*b*). For the former case the common law provided its most ancient remedies—the writ of right (and later the various assizes and the writ of entry) for land, and the parallel writ of detinue (parallel as being merely a variation of the writ of debt, which was precisely similar in form to the writ of right) for goods; to this must be added, in special, but once frequent and important cases, replevin (*c*). For the latter the writ of waste (as extended by the Statutes of Marlbridge and Gloucester) was available as to land; later this was supplanted by an action on the case (*d*) "in the nature of waste," and in modern times the powers and remedies of courts of equity have been

(*a*) See F. N. B. 86–88, *passim*.

(*b*) As to the term "reversionary interest" applied to goods, cp. Dicey on Parties, 345. In one way "reversioner" would be more correct than "owner" or "general owner" for the person entitled to sue in trover or prosecute for theft is not necessarily *dominus*, and the *dominus* of the chattel may be disqualified from so suing or prosecuting.

(*c*) It seems useless to say more of replevin here. The curious reader may consult Mennie *v.* Blake (1856) 6 E. & B. 842; 25 L. J. Q. B. 399. For the earliest form of writ of entry see Close Rolls, vol. i. p. 32. Blackstone is wrong in stating it to have been older than the assizes.

(*d*) When the tenancy was at will, trespass would lie, Litt. s. 71; "the taking upon him power to cut timber or prostrate houses concerneth so much the freehold and inheritance as it doth amount in law to a determination of his will," Co. Litt. 57*a*: just as a bailee who "breaks bulk" is held to repudiate the bailment and become a mere trespasser.

found still more effectual (*e*). The process of devising [* 285] a practical remedy * for owners of chattels was more circuitous; they were helped by an action on the case which became a distinct species under the name of trover, derived from the usual form of pleading, which alleged that the defendant found the plaintiff's goods and converted them to his own use (*f*). The original notion of *conversion* in personal chattels answers closely to that of *waste* in tenements; but it was soon extended so as to cover the whole ground of detinue (*g*), and largely overlap trespass; a mere trespasser whose acts would have amounted to conversion if done by a lawful possessor not being allowed to take exception to the true owner "waiving the trespass," and professing to assume in the defendant's favour that his possession had a lawful origin.

IV.—*Waste.*

Waste.

Waste is any unauthorized act of a tenant for a freehold estate not of inheritance, or for any lesser interest, which tends to the destruction of the tenement, or otherwise to the injury of the inheritance. Such injury need not consist in loss of market value; an alteration not otherwise mischievous may be waste in that it throws doubt on the identification of the property, and thereby impairs the evidence of title. It is said that every conversion of land from one species to another—as ploughing up woodland, or turning arable into pasture land—is waste, and it has even been said that building a new house is waste (*h*). But modern authority does not [* 286] bear this out; "in order * to prove waste you must prove an injury to the inheritance" either "in the sense of value" or "in the sense of destroying identity" (*i*). And in the United States, especially the

(*e*) For the history and old law, see Co. Litt. 53, 54; Blackst. ii. 281; iii. 225; notes to Greene *v.* Cole, 2 Wms. Saund. 644; and Woodhouse *v.* Walker (1880) 5 Q. B. D. 404. The action of waste proper could be brought only "by him that hath the immediate estate of inheritance," Co. Litt. 53*a*.

(*f*) Blackst. iii. 152, cf. the judgment of Martin B. in Burroughes *v.* Bayne (1860) 5 H. & N. 296; 29 L. J. Ex. 185, 188; and as to the forms of pleading, Bro. Ab. Accion sur le Case, 103, 109, 113.

(*g*) Martin B. *l. c.* whose phrase "in very ancient times" is a little misleading, for trover, as a settled common form, seems to date only from the 16th century; Reeves' Hist. Eng. L. iv. 526.

(*h*) "If the tenant build a new house, it is waste; and if he suffer it to be wasted, it is a new waste." Co. Litt. 53*a*.

(*i*) Jones *v.* Chappell (1875) 20 Eq. 539, 540–2 (Jessel M. R.)

Western States, many acts are held to be only in a natural and reasonable way of using and improving the land—clearing wild woods for example—which in England, or even in the Eastern States, would be manifest waste (*k*). As to permissive waste, *i. e.*, suffering the tenement to lose its value or go to ruin for want of necessary repair, a tenant for life or years is liable therefor if an express duty to repair is imposed upon him by the instrument creating his estate: otherwise it is doubtful (*l*). It seems that it can in no case be waste to use a tenement in an apparently reasonable and proper manner, "having regard to its character and to the purposes for which it was intended to be used" (*m*), whatever the actual consequences of such user may be. Where a particular course of user has been carried on for a considerable course of time, with the apparent knowledge and assent of the owner of the inheritance, the Court will make all reasonable presumptions in favour of referring acts so done to a lawful origin (*n*).

Modern law of waste: tenants for life.

In modern practice, questions of waste arise either between a tenant for life (*o*) and those in remainder, or * between landlord and tenant. In the for- [* 287] mer case, the unauthorized cutting of timber is the most usual ground of complaint; in the latter, the forms of misuse or neglect are as various as the uses, agricultural, commercial, or manufacturing, for which the tenement may be let and occupied. With regard to timber, it is to be observed that there are "timber estates" on which wood is grown for the purpose of periodical cutting and sale, so that "cutting the timber is the mode of cultivation" (*p*). On such land cutting the timber is equivalent to taking a crop off arable

(*k*) Cooley on Torts, 333.

(*l*) Woodhouse *v.* Walker (1880) 5 Q. B. D. 404, 407. An equitable tenant for life is not liable for permissive waste: Powys *v.* Blagrave (1854) 4 D. M. G. 448; Re Hotchkys, Freke *v.* Calmady (1886) 32 Ch. D. 408.

(*m*) Manchester Bonded Warehouse Co. *v.* Carr (1880) 5 C. P. D. 507, 512; following Saner *v.* Bilton (1878) 7 Ch. D. 815, 821; cp. Job *v.* Potton (1875) 20 Eq. 84.

(*n*) Elias *v.* Snowden Slate Quarries Co. (1879) 4 App. Ca. 454, 465.

(*o*) In the United States, where tenancy in dower is still common, there are many modern decisions on questions of waste arising out of such tenancies. See Cooley on Torts, 333, or Scribner on Dower (2nd ed. 1883) i. 212—214; ii. 795 *sqq.*

(*p*) As to the general law concerning timber, and its possible variation by local custom, see the judgment of Jessel M. R., Honywood *v.* Honywood (1874) 18 Eq. 306, 309.

land, and if done in the usual course is not waste. A tenant for life whose estate is expressed to be without impeachment of waste may freely take timber and minerals for use, but, unless with further specific authority, he must not remove timber planted for ornament (save so far as the cutting of part is required for the preservation of the rest) (*q*), open a mine in a garden or pleasure-ground, or do like acts destructive to the individual character and amenity of the dwelling-place (*r*). The commission of such waste may be restrained by injunction, without regard to pecuniary damage to the inheritance : but, when it is once committed, the normal measure of damages can only be the actual loss of value (*s*). Further details on the subject [* 288] * would not be appropriate here. They belong rather to the law of Real Property.

Landlord and tenant.

As between landlord and tenant the real matter in dispute, in a case of alleged waste, is commonly the extent of the tenant's obligation, under his express or implied covenants, to keep the property demised in safe condition or repair. Yet the wrong of waste is none the less committed (and under the old procedure was no less remediable by the appropriate action on the case) because it is also a breach of the tenant's contract (*t*). Since the Judicature Acts it is impossible to say whether an action alleging misuse of the tenement by a lessee is brought on the contract or as for a tort (*u*): doubtless it would be treated as an action of contract if it became necessary for any purpose to assign it to one or the other class.

V.—*Conversion.*

Conversion: relation of trover to trespass.

Conversion, according to recent authority, may be described as the wrong done by "an unauthorized act which deprives another of his property permanently or for an

(*q*) See Baker *v.* Sebright (1879) 13 Ch. D. 179; but it seems that a remainderman coming in time would be entitled to the supervision of the Court in such case; *ib.* 188.

(*r*) Waste of this kind was known as "equitable waste," the commission of it by a tenant unimpeachable for waste not being treated as wrongful at common law: see now 36 & 37 Vict. c. 66 (the Supreme Court of Judicature Act, 1873), s. 25, sub-s. 3.

(*s*) Bubb *v.* Yelverton (1870) 10 Eq. 465. Here the tenant for life had acted in good faith under the belief that he was improving the property. Wanton acts of destruction would be very differently treated.

(*t*) 2 Wms. Saund. 646.

(*u*) *E. g.* Tucker *v.* Linger (1882) 21 Ch. Div. 18.

indefinite time" (*x*). Such an act may or may not include a trespass; whether it does or not is immaterial as regards the right of the plaintiff in a civil action, for even under the old forms he might "waive the trespass;" though as regards the possibility of the wrongdoer being criminally liable it may still be a vital question, trespass by taking and carrying away the goods being a necessary element in * the offence of [* 289] larceny at common law. But the definition of theft (in the first instance narrow but strictly consistent, afterwards complicated by some judicial refinements and by numerous unsystematic statutory additions) does not concern us here. The "property" of which the plaintiff is deprived—the subject-matter of the right which is violated—must be something which he has the immediate right to possess; only on this condition could one maintain the action of trover under the old forms. Thus, where goods had been sold and remained in the vendor's possession subject to the vendor's lien for unpaid purchase-money, the purchaser could not bring an action of trover against a stranger who removed the goods, at all events without payment or tender of the unpaid balance (*y*).

But an owner not entitled to immediate possession might have a special action on the case, not being trover, for any permanent injury to his interest, though the wrongful act might also be a trespass, conversion, or breach of contract as against the immediate possessor (*z*). As under the Judicature Acts the difference of form between trover and a special action which is not trover does not exist, there seems to be no good reason why the idea and the name of conversion should not be extended to cover these last mentioned cases.

What amounts to conversion.

On the other hand, the name has been thought altogether objectionable by considerable authorities (*a*): and certainly the natural meaning of converting property to one's own use has long been left behind. It came to be seen that the actual diversion of the benefit

(*x*) Bramwell B., adopting the expression of Bosanquet, *arg.*, Hiort *v.* Bott (1874) L. R. 9 Ex. 86, 89. All, or nearly all, the learning on the subject down to 1871 is collected (in a somewhat formless manner it must be allowed) in the notes to Wilbraham *v.* Snow, 2 Wms. Saund. 87.

(*y*) Lord *v.* Price (1874) L. R. 9 Ex. 54.

(*z*) Mears *v.* L. & S. W. R. Co. (1862) 11 C. B. N. S. 850; 31 L. J. C. P. 220.

(*a*) Sec 2 Wms. Saund. 108, and per Bramwell L. J., 4 Ex. D. 194.

[* 290] arising from use and possession * was only one aspect of the wrong, and not a constant one. It did not matter to the plaintiff whether it was the defendant, or a third person taking delivery from the defendant, who used his goods, or whether they were used at all; the essence of the injury was that the use and possession were dealt with in a manner adverse to the plaintiff and inconsistent with his right of dominion.

The grievance is the unauthorized assumption of the powers of the true owner. Actually dealing with another's goods as owner for however short a time and however limited a purpose (*b*) is therefore conversion; so is an act which in fact enables a third person to deal with them as owner, and which would make such dealing lawful only if done by the person really entitled to possess the goods (*c*). It makes no difference that such acts were done under a mistaken but honest and even reasonable supposition of being lawfully entitled (*b*), or even with the intention of benefiting the true owner (*c*); nor is a servant excused for assuming the dominion of goods on his master's behalf, though he "acted under an unavoidable ignorance and for his master's benefit" (*d*). A refusal to deliver possession to the true owner on demand is commonly said to be evidence of a conversion, but evidence only; that is, one natural inference if I hold a thing and will not deliver it to the owner is that I repudiate his ownership and mean to exercise dominion in spite of his title either on my own behalf or on some other claimant's. "If the refusal is in disregard of the plaintiff's title, and for the purpose of claiming the goods either for the defendant or for a third person, it is a conversion" (*e*). But this is not [* 291] the only possible * inference and may not be the right one. The refusal may be a qualified and provisional one: the possessor may say, "I am willing to do right, but that I may be sure I am doing right, give me reasonable proof that you are the true owner": and such a possessor, even if over-cautious in the amount of satisfaction he requires, can hardly be said to repudi-

---

(*b*) Hollins *v.* Fowler (1875) L. R. 7 H. L. 757.

(*c*) Hiort *v.* Bott, L. R. 9 Ex. 86.

(*d*) Stephens *v.* Elwall (1815) 4 M. & S. 259; admitted to be good law in Hollins *v.* Fowler, L. R. 7 H. L. at pp. 769, 795. Cp. Fine Art Society *v.* Union Bank of London (1886) 17 Q. B. Div. 705.

(*e*) Opinion of Blackburn J. in Hollins *v.* Fowler, L. R. 7 H. L. at p. 766.

ate the true owner's claim (*f*). Or a servant having the mere custody of goods under the possession of his master as bailee—say the servant of a warehouseman having the key of the warehouse— may reasonably and justifiably say to the bailor demanding his goods: "I cannot deliver them without my master's order"; and this is no conversion. "An unqualified refusal is almost always conclusive evidence of a conversion; but if there be a qualification annexed to it, the question then is whether it be a reasonable one" (*g*). Again there may be a wrongful dealing with goods, not under an adverse claim, but to avoid having anything to do with them or with their owner. Where a dispute arises between the master of a ferryboat and a passenger, and the master refuses to carry the passenger and puts his goods on shore, this may be a trespass, but it is not of itself a conversion (*h*). This seems of little importance in modern practice, but we shall see that it might still affect the measure of damages.

By a conversion the true owner is, in contemplation of law, totally deprived of his goods; therefore, except in a few very special cases (*i*), the measure of damages in an *action of trover was the full [*292] value of the goods, and by a satisfied judgment (*k*) for the plaintiff the property in the goods, if they still existed *in specie* was transferred to the defendant.

Acts not amounting to conversion.

The mere assertion of a pretended right to deal with goods or threatening to prevent the owner from dealing with them is not conversion, though it may perhaps be a cause of action, if special damage can be shown (*l*); indeed it is doubtful whether a person not already in possession can commit the wrong of conversion by any act of interference limited to a special purpose and falling short of a total assumption of domin-

(*f*) See Burroughes *v.* Bayne (1860) 5 H. & N. 296; 29 L. J. Ex. 185, 188; *supra*, p. 285.

(*g*) Alexander *v.* Southey (1821) 5 B. & A. 247, per Best J. at p. 250.

(*h*) Fouldes *v.* Willoughby, 8 M. & W. 540; cp. Wilson *v.* McLaughlin (1871) 107 Mass. 587.

(*i*) See per Bramwell L. J., 3 Q. B. D. 490; Hiort *v.* L. & N. W. R. Co. (1879) 4 Ex. Div. 188, where however Bramwell L. J. was the only member of the Court who was clear that there was any conversion at all.

(*k*) Not by judgment without satisfaction; *Ex parte* Drake (1877) 5 Ch. Div. 866; following Brinsmead *v.* Harrison (1871) L. R. 6 C. P. 584.

(*l*) England *v.* Cowley (1873) L. R. 9 Ex. 126; see per Kelly C. B. at p. 132.

ion against the true owner (*m*). An attempted sale of goods which does not affect the property, the seller having no title and the sale not being in market overt, nor yet the possession, there being no delivery, is not a conversion. If undertaken in good faith, if would seem not to be actionable at all; otherwise it might come within the analogy of slander of title. But if a wrongful sale is followed up by delivery, both the seller (*n*) and the buyer (*o*) are guilty of a conversion. Again, a mere collateral breach of contract in dealing with goods entrusted to one is not a conversion; as where the master of a ship would not sign a bill of lading except with special terms which he had no [* 293] right to require, but took the cargo to * the proper port and was willing to deliver it, on payment of freight, to the proper consignee (*p*).

Dealings under authority of apparent owner.

A merely ministerial dealing with goods, at the request of an apparent owner having the actual control of them, appears not to be conversion (*q*); but the extent of this limitation or exception is not precisely defined. The point is handled in the opinion delivered to the House of Lords in Hollins *v.* Fowler (*r*) by Lord Blackburn, then a Justice of the Queen's Bench; an opinion which gives in a relatively small compass a lucid and instructive view of the whole theory of the action of trover. It is there said that "on principle, one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodian is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession (*s*), if he was a finder of the goods, or in-

(*m*) See per Bramwell B. and Kelly C. B. *ib.* 131, 132.

(*n*) Lancashire Wagon Co. *v.* Fitzhugh (1861) 6 H. & N. 502; 30 L. J. Ex. 231 (action by bailor against sheriff for selling the goods absolutely as goods of the bailee under a *fi. fa.*; the decision is on the pleadings only).

(*o*) Cooper *v.* Willomatt (1845) 1 C. B. 672; 14 L. J. C. P. 219.

(*p*) Jones *v.* Hough (1879) 5 C. P. Div. 115: cp. Heald *v.* Carey (next note).

(*q*) Heald *v.* Carey (1852) 11 C. B. 977; 21 L. J. C P. 97; but this is really a case of the class last mentioned, for the defendant received the goods on behalf of the true owner, and was held to have done nothing with them that he might not properly do.

(*r*) L. R. 7 H. L. at pp. 766—768.

(*s*) Observe that this means physical possession; in some of the cases proposed it would be accompanied by legal possession, in others not.

trusted with their custody. This excludes from protection, and was intended to exclude, such acts as those of the defendants in the case then at bar: they had bought cotton, innocently and without negligence, from a holder who had obtained it by fraud and had no title, and they had immediately resold it to a firm for whom they habitually acted as cotton brokers, not making any profit beyond a broker's commission. Still it * appeared to the majority of the judges and [* 294] to the House of Lords that the transaction was not a purchase on account of a certain customer as principal, but a purchase with a mere expectation of that customer (or some other customer) taking the goods; the defendants therefore exercised a real and effective though transitory dominion: and having thus assumed to dispose of the goods, they were liable to the true owner (*t*). So would the ultimate purchasers have been (though they bought and used the cotton in good faith), had the plaintiffs thought fit to sue them (*u*).

Acts of servants.

But what of the servants of those purchasers, who handled the cotton under their authority and apparent title, and by making into twist wholly changed its form? Assuredly this was conversion enough in fact and in the common sense of the word; but was it a conversion in law? Could any one of the factory hands have been made the nominal defendant and liable for the whole value of the cotton? Or if a thief brings corn to a miller, and the miller, honestly taking him to be the true owner, grinds the corn into meal and delivers the meal to him without notice of his want of title; is the miller, or are his servants, liable to the true owner for the value of the corn (*u*)? Lord Blackburn thought these questions open and doubtful. There appears to be nothing in the authorities to prevent it from being excusable to deal with goods merely as the servant or agent of an apparent owner in actual possession, or under a contract with such owner, according to the apparent owner's direction; neither the act done, nor the contract (if any), purporting to involve a transfer of the supposed property in the goods, and the ostensible owner's direction being * one which he could [* 295] lawfully give if he were really entitled to his apparent interest, and being obeyed in the honest (*x*) belief that

(*t*) See per Lord Cairns 7 H. L. at p. 797.

(*u*) Blackburn J. 7 H. L. 764, 768.

(*x*) Should we say "honest and reasonable"? It seems not; a person doing a ministerial act of this kind honestly but not rea-

he is so entitled. It might or might not be convenient to hold a person excused who in good faith assumes to dispose of goods as the servant and under the authority and for the benefit of a person apparently entitled to possession but not already in possession. But this could not be done without overruling accepted authorities (*y*).

Redelivery by bailees.

A bailee is *prima facie* estopped as between himself and the bailor from disputing the bailor's title (*z*). Hence, as he cannot be liable to two adverse claimants at once, he is also justified in redelivering to the bailor in pursuance of his employment, so long as he has not notice (or rather is not under the effective pressure) (*a*) of any paramount claim: it is only when he is in danger of such a claim that he is not bound to redeliver to the bailor (*b*). This case evidently falls within the principle suggested by Lord Blackburn; but the rules depend on the special character of a bailee's contract.

Abuse of limited interest.

Where a bailee has an interest of his own in the goods (as in the common cases of hiring and pledge) [* 296] and under * colour of that interest deals with the goods in excess of his right, questions of another kind arise. Any excess whatever by the possessor of his rights under his contract with the owner will of course be a breach of contract, and it may be a wrong. But it will not be the wrong of conversion unless the possessor's dealing is "wholly inconsistent with the contract under which he had the limited interest," as if a hirer for example destroys or sells the goods (*c*). That is a conversion, for it is deemed to be a repudiation of the contract, so that the owner who has parted with

---

sonably ought to be liable for negligence to the extent of the actual damage imputable to his negligence, not in trover for the full value of the goods; and even apart from the technical effect of conversion, negligence would be the substantial and rational ground of liability. Behaviour grossly inconsistent with the common prudence of an honest man might here, as elsewhere, be evidence of bad faith.

(*y*) See Stephens *v.* Elwall, 4 M. & S. 259, p. 290, above.

(*z*) 7 Hen. VII. 22, pl. 3, per Martin. Common learning in modern books.

(*a*) Biddle *v.* Bond (1865) 6 B. & S. 225; 34 L. J. Q. B. 137, where it is said that there must be something equivalent to eviction by title paramount.

(*b*) See Sheridan *v.* New Quay Co. (1858) 4 C. B. N. S. 618; 28 L. J. C. P. 58; European and Australian Royal Mail Co. *v.* Royal Mail Steam Packet Co. (1861) 30 L. J. C. P. 247.

(*c*) Blackburn J., L. R. 1 Q. B. 614; Cooper *v.* Willomatt, 1 C. B. 672; 14 L. J. C. P. 219.

possession for a limited purpose is by the wrongful act itself restored to the immediate right of possession, and becomes the effectual "true owner" capable of suing for the goods or their value. But a merely irregular exercise of power, as a sub-pledge (*d*) or a premature sale (*e*), is not a conversion; it is at most a wrong done to the reversionary interest of an owner out of possession, and that owner must show that he is really damnified (*f*).

The technical distinction between an action of detinue or trover and a special action on the case here corresponds to the substantial and permanent difference between a wrongful act for which the defendant's rightful possession is merely the opportunity, and a more or less plausible abuse of the right itself.

The case of a common law lien, which gives no power of disposal at all, is different; there the holder's only right is to keep possession until his claim is satisfied. If he parts * with possession, his right [* 297] is gone, and his attempted disposal merely wrongful, and therefore he is liable for the full value (*g*). But a seller remaining in possession who re-sells before the buyers is in default is liable to the buyer only for the damage really sustained, that is, the amount (if any) by which the market price of the goods, at the time when the seller ought to have delivered them, exceeds the contract price (*h*). The seller cannot sue the buyer for the price of the goods, and if the buyer could recover the full value from the seller he would get it without any consideration: the real substance of the cause of action is the breach of contract, which is to be compensated according to the actual damage (*i*).

(*d*) Donald *v.* Suckling (1866) L. R. 1 Q. B. 585.

(*e*) Halliday *v.* Holgate (1868) Ex. Ch. L. R. 3 Ex. 299; see at p. 302.

(*f*) In Johnson *v.* Stear (1863) 15 C. B. N. S. 330; 33 L. J. C. P. 130, nominal damages were given; but it is doubtful whether, on the reasoning adopted by the majority of the Court, there should not have been judgment for the defendant: see 2 Wms. Saund. 114; Blackburn J., L. R. 1 Q. B. 617; Bramwell L. J., 3 Q. B. D. 490.

(*g*) Mulliner *v.* Florence (1878) 3 Q. B. Div. 484, where an innkeeper sold a guest's goods. A statutory power of sale was given to innkeepers very shortly after this decision (41 & 42 Vict. c. 38), but the principle may still be applicable in other cases.

(*h*) Chinery *v.* Viall (1860) 5 H. & N. 288; 29 L. J. Ex. 180.

(*i*) "A man cannot merely by changing his form of action vary the amount of damage so as to recover more than the amount to which he is in law really entitled according to the true facts of the case and the real nature of the transaction:" per Cur. 29 L. J. Ex. 184.

A mortgagor having the possession and use of goods under covenants entitling him thereto for a certain time, determinable by default after notice, is virtually a bailee for a term, and, like bailees in general, may be guilty of conversion by an absolute disposal of the goods; and so may assignees claiming through him with no better title than his own; the point being, as in the other cases, that the act is entirely inconsistent with the terms of the bailment (*k*). One may be allowed to doubt, with Lord Blackburn, whether these fine distinctions have done much good, and to wish "it had been originally determined that even in such cases the owner should bring a special action on the case and [* 298] recover the * damage which he actually sustained" (*l*). Certainly the law would have been simpler, perhaps it would have been juster. It may not be beyond the power of the House of Lords or the Court of Appeal to simplify it even now: but our business is to take account of the authorities as they stand. And, as they stand, we have to distinguish between—

(i) Ordinary cases of conversion where the full value can be recovered:

(ii) Cases where there is a conversion but only the plaintiff's actual damage can be recovered:

(iii) Cases where there is a conversion but only nominal damages can be recovered; but such cases are anomalous, and depend on the substantial cause of action being the breach of a contract between the parties; it seems doubtful whether they ought ever to have been admitted:

(iv.) Cases where there is not a conversion, but an action (formerly a special or innominate action on the case) lies to recover the actual damage.

VI.—*Injuries between Tenants in Common.*

Trespasses between tenants in common.

As between tenants in common of either land or chattels there cannot be trespass unless the act amounts to an actual ouster, *i. e.* dispossession. Short of that "trespass will not lie by the one against the other so far as the land is concerned" (*m*). In the same way

(*k*) Fenn *v.* Bittleston (1851) 7 Ex. 152; 21 L. J. Ex. 41; where see the distinction as to trespass and larceny carefully noted in the judgment delivered by Parke B.

(*l*) L. R. 1 Q. B. at p. 614.

(*m*) Lord Hatherley, Jacobs *v.* Seward (1872) L. R. 5 H. L. 464, 472.

See addenda page xxxii.

acts of legitimate use of the common property cannot become a conversion through subsequent misappropriation, though the form in which the property exists may be wholly converted, in a wider sense, into other forms. There is no wrong to the co-tenant's right of property until there is an act inconsistent with the enjoyment of the property by both. * For every tenant or [* 299] owner in common is equally entitled to the occupation and use of the tenement or property (*n*); he can therefore become a trespasser only by the manifest assumption of an exclusive and hostile possession. It was for some time doubted whether even an actual expulsion of one tenant in common by another were a trespass; but the law was settled, in the latest period of the old forms of pleading, that it is (o). At first sight this seems an exception to the rule that a person who is lawfully in possession cannot commit trespass: but it is not so, for a tenant in common has legal possession only of his own share. Acts which involve the destruction of the property held in common, such as digging up and carrying away the soil, are deemed to include ouster (*p*); unless, of course, the very nature of the property (a coal-mine for example) be such that the working out of it is the natural and necessary course of use and enjoyment, in which case the working is treated as rightfully undertaken for the benefit of all entitled, and there is no question of trespass to property, but only, if dispute arises, of accounting for the proceeds (*q*).

VII.—*Extended Protection of Possession.*

Rights of *de facto* possessor against strangers.

An important extension of legal protection and remedies has yet to be noticed. Trespass and other violations of possessory rights can be committed not only against the person who is lawfully in possession, but against any person who has legal possession, whether rightful in its origin or not, so long as the intruder cannot justify his act under a better title. A mere stranger cannot be heard to say that one whose possession he has violated was not entitled * to pos- [* 300] sess. Unless and until a superior title or justification is shown, existing legal possession is not only presump-

(*n*) Litt. s. 323.
(*o*) Murray *v.* Hall (1849) 7 C. B. 441; 18 L. J. C. P. 161; and Bigelow L. C. 343.
(*p*) Wilkinson *v.* Haygarth (1846) 12 Q. B. 837; 16 L. J. Q. B. 103; Co. Litt. 200.
(*q*) Job *v.* Potton (1875) 20 Eq. 84.

tive but conclusive evidence of the right to possess. Sometimes mere detention may be sufficient: but on principle it seems more correct to say that physical control or occupation is *prima facie* evidence that the holder is in exercise (on his own behalf or on that of another) of an actual legal possession, and then, if the contrary does not appear, the incidents of legal possession follow. The practical result is that an outstanding claim of a third party (*jus tertii*, as it is called) cannot be set up to excuse either trespass or conversion: "against a wrong-doer, possession is a title": or, as the Roman maxim runs, "adversus extraneos vitiosa possessio prodesse solet" (*q*). As regards real property, a possession commencing by trespass can be defended against a stranger not only by the first wrongful occupier, but by those claiming through him; in fact it is a good root of title as against every one except the person really entitled (*r*); and ultimately, by the operation of the Statutes of Limitation, it may become so as against him also.

The authorities do not clearly decide, but seem to imply, that it would make no difference if the *de facto* possession violated by the defendant were not only without title, but obviously wrongful. But the rule is in aid of *de facto* possession only. It will not help a claimant who has been in possession but has been dispossessed in a lawful manner and has not any right to possess (*s*).

[* 301] * This rule in favor of possessors is fundamental in both civil and criminal jurisdiction. It is indifferent for most practical purposes whether we deem the reason of the law to be that the existing possession is *prima facie* evidence of ownership or of the right to possess—"the presumption of law is that the person who has possession has the property" (*t*)—

(*q*) Jeffries *v.* G. W. R. Co. (1856) 5 E. & B. 802; 25 L. J. Q. B. 107; Bourne *v.* Fosbrooke (1865) 18 C. B. N. S. 515; 34 L. J. C. P. 164; extending the principle of Armory *v.* Delamirie (1722) 1 Str. 504 [505], and in 1 Sm. L. C.; D. 41. 3, de poss. 53, cf. Paulus Sent. Rec. v. 11 § 2: "sufficit ad probationem si rem corporaliter teneam." And such use and enjoyment as the nature of the subject-matter admits of is good evidence of possession. See Harper *v.* Charlesworth (1825) 4 B. & C. 574.

(*r*) Asher *v.* Whitlock (1865) L. R. 1 Q. B. 1; cp. Cutts *v.* Spring (1818) 15 Mass. 135; and Bigelow L. C. 341.

(*s*) Buckley *v.* Gross (1863) 3 B. & S. 566; 32 L. J. Q. B. 129.

(*t*) Lord Campbell C. J. in Jeffries *v.* G. W. R. Co. (1856) 5 E. & B. at p. 806; but this does not seem consistent with the protection of even a manifestly wrongful possessor against a new

or, that for the sake of public peace and security, and as "an extension of that protection which the law throws around the person" (*u*), the existing possession is protected, without regard to its origin, against all men who cannot make out a better right, or say (*x*) that the law protects possession for the sake of true owners, and to relieve them from the vexatious burden of continual proof of title, but cannot do this effectually without protecting wrongful possessors also. Such considerations may be guides and aids in the future development of the law, but none of them will adequately explain how or why it came to be what it is.

Rights of owner entitled to resume possession.

Again, as *de facto* possession is thus protected, so *de jure* possession—if by that term we may designate an immediate right to possess when separated from actual legal possession—was even under the old system of pleading invested with the benefit of strictly possessory remedies ; that is, an owner who had parted with possession, but was entitled to resume it at will, could sue in trespass for * a disturbance by a [* 302] stranger. Such is the case of a landlord where the tenancy is at will (*y*), or of a bailor where the bailment is revocable at will, or on a condition that can be satisfied at will. In this way the same act may be a trespass both against the actual possessor and against the person entitled to rssume possession. "If I let my land at will, and a stranger enters and digs in the land, the tenant may bring trespass for his loss, and I may bring trespass for the loss and destruction of my land" (*y*).

Rights of derivative possessors.

Derivative possession is equally protected, through whatever number of removes it may have to be traced from the owner in possession, who (by modern lawyers at any rate) is assumed as the normal root of title.

---

extraneous wrong-doer. In Roman law a thief has the interdicts though not the *actio furti*, which requires a lawful interest in the plaintiff; in the common law it seems that he can maintain trespass.

(*u*) Lord Denman C. J. in Rogers *v.* Spence (1844) 13 M. & W. at p. 581. This is precisely Savigny's theory, which however is not now generally accepted by students of Roman law. In some respects it fits the common law better. Mr. Justice Holmes in "The Common Law" takes a view *ejusdem generis*, but distinct.

(*x*) With Ihering (Grund des Besitzesschutzes, 2d ed. 1869).

(*y*) Bro. Ab. Trespass, pl. 131 ; 19 Hen. VI. 45, pl. 94, where it is pointed out that the trespasser's act is one, but the causes of action are "diversis respectibus," as where a servant is beaten and the master has an action for loss of service.

It may happen that a bailee delivers lawful possession to a third person, to hold as under bailee from himself, or else as immediate bailee from the true owner : nay more, he may re-deliver possession to the bailor for a limited purpose, so that the bailor has possession and is entitled to possess, not in his original right, but in a subordinate right derived from his own bailee (*z*). Such a right, while it exists, is as fully protected as the primary right of the owner would have been, or the secondary right of the bailee would be.

Possession derived through trespasser.

Troublesome questions were raised under the old law by the position of a person who had got possession of goods through delivery made by a mere trespasser or by an originally lawful possessor acting in excess of his right. One who receives from a trespasser, even with full knowledge, does not himself become a trespasser against the true owner, as he has not violated an [* 303] existing lawful *possession. The best proof that such is the law is the existence of the offence of receiving stolen goods as distinct from theft; if receiving from a trespasser made one a trespasser, the receipt of stolen goods with the intention of depriving the true owner of them would have been larceny at common law. Similarly where a bailee wrongfully delivers the goods over to a stranger; though the bailee's mere assent will not prevent a wrongful taking by the stranger from being a trespass (*a*).

The old law of real property was even more favourable to persons claiming through a disseisor; but it would be useless to give details here. At the present day the old forms of action are almost everywhere abolished; and it is quite certain that the possessor under a wrongful title, even if he is himself acting in good faith, is by the common law liable in some form to the true owner (*b*), and in the case of goods must submit to recapture if the owner can and will retake them (*c*). In the theoretically possible case of a series of changes of possession by independent trespasses, it would seem that every successive wrong-doer is a trespasser only as against his immediate predecessor, whose *de facto* pos-

(*z*) Roberts *v.* Wyatt (1810) 2 Taunt. 268.

(*a*) 27 Hen. VII. 39, pl. 49; cp. 16 Hen. VII. 2, pl. 7; Mennie *v.* Blake (1856) 6 E. & B. 842; 25 L. J. Q. B. 399.

(*b*) 12 Edw. IV. 13, pl. 9; but this was probably an innovation at the time, for Brian dissented.

(*c*) See Blades *v.* Higgs (1865) 11 H. L. C. 621; 34 L. J. C. P. 286, where this was assumed without discussion, only the question of property being argued.

session he disturbed: though as regards land exceptions to this principle, the extent of which is not free from doubt, were introduced by the doctrine of "entry by relation" and the practice as to recovery of mesne profits. But this too is now, as regards civil liability, a matter of mere curiosity (*d*).

---

* VIII.—*Wrongs to Easements, etc.* [* 304]

Violation of incorporeal rights.

Easements and other incorporeal rights in property, "rather a fringe to property than property itself" as they have been ingeniously called (*e*), are not capable in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession, and gives no possessory right before the due time is fulfilled: "a man who has used a way ten years without title cannot sue even a stranger for stopping it" (*f*). The only possession that can come in question is the possession of the dominant tenement itself, the texture of legal rights and powers to which the "fringe" is incident. Nevertheless disturbance of easements and the like, as completely existing rights of use and enjoyment, is a wrong in the nature of trespass, and remediable by action without any allegation or proof of specific damage (*g*); the action was on the case under the old forms of pleading, since trespass was technically impossible, though the act of disturbance might happen to include a distinct trespass of some kind, for which trespass would lie at the plaintiff's option.

To consider what amounts to the disturbance of rights *in re aliena* is in effect to consider the nature

---

(*d*) The common law might conceivably have held that there was a kind of a privity of wrongful estate between an original trespasser and persons claiming through him, and thus applied the doctrine of continuing trespass to such persons; and this would perhaps have been the more logical course. But the natural dislike of the judges to multiplying capital felonies, operating on the intimate connexion between trespass and larceny, has in several directions prevented the law of trespass from being logical. For the law of trespass to land as affected by relation, see Barnet *v.* Guildford (1855) 11 Ex. 19; 24 L. J. Ex. 280; Anderson *v.* Radcliffe (1860) Ex. Ch. E. B. & E. 819; 29 L. J. Q. B. 128; and Bigelow L. C. 361—370.

(*e*) Mr. Gibbons, Preface to the fifth edition of Gale on Easements, 1876.

(*f*) Holmes, the Common Law, 240, 382.

(*g*) 1 Wms. Saund. 626; Harrop *v.* Hirst (1868) L. R. 4 Ex. 43, 46.

and extent of the rights themselves (*h*), and this does [* 305] not enter into our * plan, save so far as such matters come under the head of Nuisance, to which a separate chapter is given.

Franchises and incorporeal rights of the like nature, as patent and copyrights, present something more akin to possession, for their essence is exclusiveness. But the same remark applies; in almost every disputed case the question is of defining the right itself, or the conditions of the right (*i*); and *de facto* enjoyment does not even provisionally create any substantive right, but is material only as an incident in the proof of title.

IX.—*Grounds of Justification and Excuse.*

Licence.

Acts of interference with land or goods may be justified by the consent of the occupier or owner; or they may be justified or excused (sometimes excused rather than justified, as we shall see) by the authority of the law. That consent which, without passing any interest in the property to which it relates, merely prevents the acts for which consent is given from being wrongful, is called a licence. There may be licences not affecting the use of property at all, and on the other hand a licence may be so connected with the transfer of property as to be in fact inseparable from it.

"A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been [* 306] * unlawful. As a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions of which without licence had been unlawful. But a licence to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licences as to the acts of

(*h*) Thus Hopkins *v.* G. N. R. Co. (1877) 2 Q. B. Div. 224, sets bounds to the exclusive right conferred by the franchise of a ferry, and Dalton *v.* Angus (1881) 6 App. Ca. 740, discusses with the utmost fulness the nature and extent of the right to lateral support for buildings. Both decisions were given, in form, on a claim for damages from alleged wrongful acts. Yet it is clear that a work on Torts is not the place to consider the many and diverse opinions expressed in Dalton *v.* Angus, or to define the franchise of a ferry or market. Again the later case of Attorney-General *v.* Horner (1885) 11 App. Ca. 66, interprets the grant of a market *in sive juxta quodam loco*, on an information alleging encroachment on public ways be the lessee of the market, and claiming an injunction.

(*i*) See last note.

hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down they are grants. So to licence a man to eat my meat, or to fire the wood in my chimney to warm him by; as to the actions of eating, firing my wood and warming him, they are licences: but it is consequent necessarily to those actions that my property be destroyed in the meat eaten, and in the wood burnt. So as in some cases by consequent and not directly, and as its effect, a dispensation or licence may destroy and alter property" (*j*).

Revocation of licence: distinction when coupled with interest.

Generally speaking, a licence is a mere voluntary suspension of the licensor's right to treat certain acts as wrongful, and is revoked by signifying to the licensee that it is no longer his will to allow those acts. The revocation of a licence is in itself no less effectual though it may be a breach of contract. If the owner of land or a building admits people thereto on payment as spectators of an entertainment or the like, it may be a breach of contract to require a person who has duly paid his money and entered to go out, but a person so required has no title to stay, and if he persists in staying he is a trespasser. His only right is to sue on the contract (*k*): when, indeed, he may get an injunction, and so be indirectly restored to the enjoyment of the licence (*l*). But if a licence is part of a transaction * whereby a lawful interest in some property, [* 307] besides that which is the immediate subject of the licence, is conferred on the licensee, and the licence is necessary to his enjoyment of that interest, the licence is said to be "coupled with an interest" and cannot be revoked until its purpose is fulfilled: nay more, where the grant obviously cannot be enjoyed without an incidental licence, the law will annex the necessary licence to the grant. "A mere licence is revocable; but that which is called a licence is often something more than a licence; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it so as to defeat his grant to which it was incident" (*m*). Thus the sale of a standing crop or of growing trees imports a licence to the buyer to enter on the land so far and so often as reasonably necessary for

(*j*) Vaughan C. J., Thomas *v.* Sorrell, Vaughan 351.

(*k*) Wood *v.* Leadbitter (1845) 13 M. & W. 838; 14 L. J. Ex. 161; Hyde *v.* Graham (1862) 1 H. & C. 593; 32 L. J. Ex. 27.

(*l*) See Frogley *v.* Earl of Lovelace (1859) Joh. 333, where however the agreement was treated as an agreement to execute a legal grant.

(*m*) Wood *v.* Leadbitter, 13 M. & W. 838, 844.

cutting and carrying off the crop or the trees, and the licence cannot be revoked until the agreed time, if any, or otherwise a reasonable time for that purpose has elapsed (*n*). The diversity to be noted between licence and grant is of respectable antiquity. In 1460 the defendant in an action of trespass set up a right of common; the plaintiff said an excessive number of beasts were put in; the defendant said this was by licence of the plaintiff; to which the plaintiff said the licence was revoked before the trespass complained of; Billing, then king's sergeant, afterwards Chief Justice of the King's Bench under Edward IV., argued that a licence may be revoked at will even if expressed to be for a term, and this seems to have so much impressed the Court that the defendant, rather than take the risk of demurring, [* 308] alleged a grant: the * reporter's note shows that he thought the point new and interesting (*nn*). But a licensee who has entered or placed goods on land under a revocable licence is entitled to have notice of revocation and a reasonable time to quit or remove his goods (*o*).

Expression of licensor's will.

The grant or revocation of a licence may be either by express words or by an act sufficiently signifying the licensor's will; if a man has leave and licence to pass through a certain gate, the licence is as effectually revoked by locking the gate as by a formal notice (*p*). In the common intercourse of life between friends and neighbours tacit licences are constantly given and acted on.

Distinction from grant as regards strangers.

We shall have something to say in another connexion (*q*) of the rights—or rather want of rights—of a "bare licensee." Here we may add that a licence, being only a personal right—or rather a waiver of the licensor's rights—is not assignable, and confers no right against any third person. If a so-called licence does operate to confer an exclusive right capable of being protected against a stranger, it must be that there is more than a licence, namely the grant of an interest or easement. And the question of grant or licence may further depend on the question whether the specified mode of use or enjoyment is known to the law as a substantive right or

(*n*) See further 2 Wms. Saund. 363—365, or Cooley on Torts 51.

(*nn*) 39 Hen. VI. 7 pl. 12.

(*o*) Cornish *v.* Stubbs (1870) L. R. 5 C. P. 334; Meller *v.* Watkins (1874) L. R. 9 Q. B. 400.

(*p*) See Hyde *v.* Graham, *supra.*

(*q*) Chap. XII. below, *ad fin.*

interest (*r*): a question that may be difficult. But it is submitted that on principle the distinction is clear. I call at a friend's house; a contractor who is doing some work on adjacent * land has encumbered [* 309] my friend's drive with rubbish; can it be said that this is a wrong to me without special damage? With such damage, indeed, it is (*s*), but only because a stranger cannot justify that which the occupier himself could not have justified. The licence is material only as showing that I was not a wrong-doer myself; the complaint is founded on actual and specific injury, not on a *quasi* trespass. Our law of trespass is not so eminently reasonable that one need be anxious to extend to licensees the very large rights which it gives to owners and occupiers.

As to justification by authority of the law, this is of two kinds:

Justification by law.

1. In favour of a true owner against a wrongful possessor; under this head come re-entry on land and retaking of goods.

2. In favour of a paramount right conferred by law against the rightful possessor; which may be in the execution of legal process, in the assertion or defence of private right, or in some cases by reason of necessity.

Re-entry herein of forcible entry.

A person entitled to the possession of lands or tenements does no wrong to the person wrongfully in possession by entering upon him; and it is said that by the old common law he might have entered by force. But forcible entry is an offence under the statute of 5 Ric. II. (A. D. 1381), which provided that "none from henceforth make an entry into any lands and tenements, but in case where entry is given by the law, and in such case not with strong hand nor with multitude of people, but only in peaceable and easy [the true reading of the Parliament Roll appears to be 'lisible, aisee, and peisible'] manner." This statute is still in force here, and "has been re-enacted in the several * American States, or recognized as a part of [* 310]

(*r*) Compare Nuttall *v.* Bracewell (1866) L. R. 2 Ex. 1, with Ormerod *v.* Todmorden Mill Co. (1883) 11 Q. B. Div. 155; and see Gale on Easements, 5th ed. 315. *Contra* the learned editors of Smith's Leading Cases, in the notes to Armory *v.* Delamirie.

(*s*) Corby *v.* Hill (1858) 4 C. B. N. S. 556; 27 L. J. C. P. 318. See more in Chap. XII. below.

See Addenda page xxxii.

the common law" (*t*). The offence is equally committed whether the person who enters by force is entitled to possession or not: but opinions have differed as to the effect of the statute in a court of civil jurisdiction. It has been held that a rightful owner who enters by force is not a trespasser, as regards the entry itself, but is liable for any independent act done by him in the course of his entry which is on the face of it wrongful, and could be justified only by a lawful possession (*u*); and it should seem, for any other consequential damage, within the general limit of natural and probable consequence, distinguishable from the very act of eviction. This is a rather subtle result, and is further complicated by the rule of law which attaches legal possession to physical control, acquired even for a very short time, so it be "definite and appreciable" (*x*) by the rightful owner. A., being entitled to immediate possession (say as a mortgagee having the legal estate) effects an actual entry by taking off a lock, without having given any notice to quit to B. the precarious occupier; thus, "in a very rough and uncourteous way," that is, peaceably but only just peaceably, he gets possession: once gotten, however, his possession is both legal and rightful. If therefore B. turns him out again by force, there is reasonable and probable cause to indict B. for a forcible entry. So the House of Lords has decided (*y*). Nevertheless, according to later judg [* 311] ments, delivered indeed in a court of first * instance, but one of them after consideration, and both learned and careful, A. commits a trespass if, being in possession by a forcible entry, he turns out B. (*z*). Moreover, the old authorities say that a forcible turning out of the person in present possession is itself a forcible entry, though the actual ingress were without violence. "He that entereth in a peaceable show (as the door being either open or but closed with a latch only), and yet when he is come in useth violence, and throweth out such as he findeth in the place, he (I say) shall not be excused: because his entry is not consummate by the only putting of his foot over the threshold,

(*t*) Cooley on Torts 323. For the remedial powers given to justices of the peace by later statutes, see Lambarde's Eirenarcha, cap. 4; 15 Ric. 2, c. 2, is still nominally in force.

(*u*) Beddall *v.* Maitland (1881) 17 Ch. D. 174; Edwick *v.* Hawkes (1881) 18 Ch. D. 199; and authorities there discussed.

(*x*) Lord Cairns in Lows *v.* Telford (1876) 1 App. Ca. at p. 421.

(*y*) Lows *v.* Telford (1876) 1 App. Ca. 414.

(*z*) See the judgment of Fry J. in Beddall *v.* Maitland, and Edwick *v.* Hawkes, *supra.*

but by the action and demeanour that he offereth when he is come into the house" (*a*). And under the old statutes and practice, "if A. shall disseise B. of his land, and B. do enter again, and put out A. with force, A. shall be restored to his possession by the help of the justices of the peace, although his first entry were utterly wrongful: and (notwithstanding the same restitution is made) yet B. may well have an assize against A., or may enter peaceably upon him again" (*b*).

But old authorities also distinctly say that no action is given by the statute to a tenant who is put out with force by the person really entitled, "because that that entry is not any disseisin of him" (*c*). There is nothing in them to countenance the notion of the personal expulsion being a distinct wrong. The opinion of Parke and Alderson was in accordance with this (*d*), and the decision from which they dissented is reconcileable with the old books only by * the ingenious distinction— [* 312] certainly not made by the majority (*e*)—of collateral wrongs from the forcible eviction itself. The correct view seems to be that the possession of a rightful owner gained by forcible entry is lawful as between the parties, but he shall be punished for the breach of the peace by losing it, besides making a fine to the king. If the latest decisions are correct, the dispossessed intruder might nevertheless have had a civil remedy in some form (by special action on the case, it would seem) for incidental injuries to person or goods. This refinement does not appear to have occurred to any of the old pleaders.

Fresh re-entry on trespasser.

A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner. His condition is quite different from that of a rightful owner out of possession, who can recover legal possession by any kind of effective interruption of the intruder's actual and exclusive control. A person who had been dismissed from the office of schoolmaster and had given up possession of a room

(*a*) Lambarde's Eirenarcha, cap. 4, p. 142, ed. 1610.

(*b*) *Ib.* 148.

(*c*) F. N. B. 248 H., Bro. Ab. Forcible Entry, 29.

(*d*) Newton *v.* Harland (1840) 1 M. & G. 644; 1 Scott N. R. 474; in Harvey *v.* Brydges (1845) 14 M. & W. at pp. 442-3, they declared themselves unconverted.

(*e*) Tindal C. J. said that possession gained by forcible entry was *illegal*: 1 M. & G. 658.

occupied by him in virtue of his office, but had afterwards re-entered and occupied for eleven days, was held not entitled to sue in trespass for an expulsion by the trustees at the end of that time. "A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title if he can without delay reinstate himself in his former possession" (*f*). [* 313] There * must be not only occupation, but effective occupation, for the acquisition of possessory rights. And unless and until possession has been acquired, the very continuance of the state of things which constitutes the trespass is a new trespass at every moment (*g*). We shall see that this was material consequences as regards the determination of a cause of excuse.

Recaption of goods.

As regards goods which have been wrongfully taken, the taker is a trespasser all the time that his wrongful possession continues, so much so that "the removal of goods, wrongfully taken at first, from one place to another, is held to be a several trespass at each place" (*h*), and a supervening *animus furandi* at any moment of the continuing trespassory possession will complete the offence of larceny and make the trespasser a thief (*i*). Accordingly the true owner may retake the goods if he can, even from an innocent third person into whose hands they have come; and, as there is nothing in this case answering to the statutes of forcible entry, he may use whatever force is reasonably necessary for the recaption (*k*). He may also enter on the first taker's land for the purpose of recapture if the taker has put the goods there (*l*); for they came there by the occupier's own wrong (*m*); but he cannot enter on

(*f*) Browne *v.* Dawson (1840) 12 A. & E. 624, 629; 10 L. J. Q. B. 7. If a new trespasser entered in this state of things, it seems that the trespasser in inchoate occupation could not sue him, but the last possessor could.

(*g*) Holmes *v.* Wilson (1839) 10 A. & E. 503; Bowyer *v.* Cook (1847) 4 C. B. 236; 16 L. J. C. P. 177; and see 2 Wms. Saund. 496.

(*h*) 1 Wms. Saund. 20.

(*i*) Reg. *v.* Riley (1857) Dears. 149; 22 L. J. M. C. 48.

(*k*) Blades *v.* Higgs (1861) 10 C. B. N. S. 713, but the reasons given at page 720 seem wrong. Maim or wounding is not justified for this cause: but violence used in defence of a wrongful possession is a new assault, and commensurate resistance to it in personal self-defense is justifiable.

(*l*) Patrick *v.* Colerick (1838) 3 M. & W. 483, explaining Blackst. Comm. iii. 4.

(*m*) Per Littleton J., 9 Edw. IV. 35, pl. 10.

a third person's land unless, it is said, the original taking was *felonious (*n*), or perhaps, as it [* 314] has been suggested, after the goods have been claimed and the occupier of the land has refused to deliver them (*o*). Possession is much more easily changed in the case of goods than in the case of land ; a transitory and almost instantaneous control has often, in criminal courts, been held to amount to asportation. The difference may have been sharpened by the rules of criminal justice, but in a general way it lies rather in the nature of the facts than in any arbitrary divergence of legal principles in dealing with immoveable and moveable property.

Process of law: breaking doors.

One of the most important heads of justification under a paramount right is the execution of legal process. The mere taking and dealing with that which the law commands to be so taken and dealt with, be it the possession of land or goods, or both possession and property of goods, is of course no wrong ; and in particular if possession of a house cannot be delivered in obedience to a writ without breaking the house open, broken it must be (*p*). It is equally settled on the other hand that "the sheriff must at his peril seize the goods of the party against whom the writ issues," and not any other goods which are wrongly supposed to be his ; even unavoidable mistake is no excuse (*q*). More special rules have been laid down as to the extent to which private property which is not itself the immediate object of the process may be invaded in executing the command of the law. The broad distinction is that outer doors may not be broken in execution of * process at the suit of a private person ; but [* 315] at the suit of the Crown, or in execution of process for contempt of a House of Parliament (*r*), or of a Superior Court, they may, and must ; and this, in the latter case, though the contempt consist in disobedience to an order made in a private suit (*s*). The authorities re-

(*n*) Blackstone *l. c.* ; Anthony *v.* Haney : (1832) 8 Bing. 187, and Bigelow L. C 374.

(*o*) Tindal C. J. in Anthony *v.* Haney : but this seems doubtful.

(*p*) Semayne's Ca. (1604-5) 5 Co. Rep. 91*b*, and in 1 Sm. L. C.

(*q*) Glasspole *v.* Young (1829) 9 B. & C. 696 ; Garland *v.* Carlisle (1837) 4 Cl. & F. 693. As to the protection of subordinate officers acting in good faith, see in the Chapter of General Exceptions, p. 102, above.

(*r*) Burdett *v.* Abbot (1811) 14 East 1, a classical case.

(*s*) And it is contempt in the sheriff himself not to execute such process by breaking in if necessary : Harvey *v.* Harvey (1884) 26 Ch. D. 644. Otherwise where attachment is, or was, merely a formal incident in ordinary civil process.

ferred to will guide the reader, if desired, to further details.

Constables, revenue officers, and other public servants, and in some cases private persons, are authorized by divers statutes to enter on lands and into houses for divers purposes, with a view to the discovery or prevention of crime, or of frauds upon the public revenue. We shall not attempt to collect these provisions.

Distress.

The right of distress, where it exists, justifies the taking of goods from the true owner: it seems that the distrainor does not acquire possession, the goods being "in the custody of the law" (*t*). Most of the practical importance of the subject is in connexion with the law of landlord and tenant, and we shall not enter here on the learning of distress for rent and other charges on land (*u*).

Damage feasant.

Distress damage feasant is the taking by an occupier of land of chattels (commonly but not necessarily animals) (*x*) found encumbering or doing damage on [* 316] the land. The * right given by the law is therefore a right of self-protection against the continuance of a trespass already commenced. It must be a manifest trespass; distress damage feasant is not allowed against a party having any colour of right, *e. g.*, one commoner cannot distrain upon another commoner for surcharging (*y*). And where a man is lawfully driving cattle along a highway, and some of them stray from it into ground not fenced off from the way, he is entitled to a reasonable time for driving them out before the occupier may distrain, and is excused for following them on the land for that purpose. What is reasonable time is a question of fact, to be determined with reference to all the circumstances of the transaction (*z*). And where cattle stray by reason of the defect of fences which the occupier is bound to repair, there is no actionable trespass and no right to distrain until the

(*t*) See West *v.* Nibbs (1847) 4 C. B. 172; 17 L. J. C. P. 150.

(*u*) As to distress in general, Blackst. Comm. book iii. c. 1.

(*x*) "All chattels whatever are distrainable damage feasant," Gilbert on Distress and Replevin (4th ed. 1823) 49. A locomotive has been distrained damage feasant; Ambergate &c. R. Co. *v.* Midland R. Co. (1853) 2 E. & B. 793; it was not actually straying, but had been put on the Midland Company's line without the statutable approval of that Company.

(*y*) Cape *v.* Scott (1874) L. R. 9 Q. B. 266.

(*z*) Goodwin *v.* Cheveley (1859) 4 H. & N. 631; 28 L. J. Ex. 298.

owner of the cattle has notice (*a*). In one respect distress damage feasant is more favoured than distress for rent. "For a rent or service the lord cannot distreine in the night, but in the day time: and so it is of a rent charge. But for damage feasant one may distreine in the night, otherwise it may be the beasts will be gone before he can take them" (*b*). But in other respects "damage feasant is the strictest distress that is, for the thing distrained must be taken in the very act," and held only as a pledge for its own individual trespass, and other requirements (*c*).

Entry to distrainor.

Entry to take a distress must be peaceable and without breaking in; it is not lawful to open a window, though * not fastened, and enter thereby (*d*). Dis- [* 317] trainors for rent have been largely holpen by statute, but the common law has not forgotten its ancient strictness where express statutory provision is wanting.

In connexion with distress the Acts for the prevention of cruelty to animals have introduced special justifications: any one may enter a pound to supply necessary food and water to animals impounded, and there is an eventual power of sale, on certain conditions, to satify the cost thereof (*e*).

Trespasses justified by necessity.

Finally there are cases in which entry on land without consent is excused by the necessity of self-preservation, or the defence of the realm (*f*), or an act of charity preserving the occupier from irremediable loss, or sometimes by the public safety or convenience, as in putting out fires, or as where a highway is impassable, and passing over the land on either side is justified; but in this last mentioned case it is perhaps rather a matter of positive common right than of excuse (*g*).

(*a*) 2 Wms. Saund. 671.

(*b*) Co. Litt. 142*a*.

(*c*) Vaspor *v.* Edwards (1701) 12 Mod. 660, where the incidents of damage feasant generally are expounded.

(*d*) Nash *v.* Lucas (1867) L. R. 2 Q. B. 590. Otherwise where the window is already partly open: Crabtree *v.* Robinson (1885) 15 Q. B. D. 312.

(*e*) 12 & 13 Vict. c. 92, s. 6; 17 & 18 Vict. c. 60, s. 1; superseding an earlier Act of William IV. to the same effect. See Fisher's Digest, DISTRESS, s. t. "Pound and Poundage."

(*f*) See p. 146, above.

(*g*) The justification or right, whichever it be, does not apply where there is only a limited dedication of a way, subject to the right of the owner of the soil to do acts, such as ploughing, which make it impassable or inconvenient at certain times: Arnold *v.* Holbrook (1873) L. R. 8 Q. B. 96.

Justifications of this kind are discussed in a case of the early sixteenth century, where a parson sued for trespass in carrying away his corn, and the defendant justified on the ground that the corn had been set out for tithes and was in danger of being spoilt, wherefore he took it and carried it to the plaintiff's barn to save it: to which the plaintiff demurred. Kingsmill J. said that a taking without consent must be justified either by [* 318] public * necessity, or "by reason of a condition in law"; neither of which grounds is present here; taking for the true owner's benefit is justifiable only if the danger be such that he will lose his goods without remedy if they are not taken. As examples of public necessity, he gives pulling down some houses to save others (in case of fire, presumably) (*h*), and entering in war time to make fortifications. "The defendant's intention," said Rede C. J. (*i*), "is material in felony but not in trespass; and here it is not enough that he acted for the plaintiff's good." A stranger's beasts might have spoilt the corn, but the plaintiff would have had his remedy against their owner. "So where my beasts are doing damage in another man's land, I may not enter to drive them out; and yet it would be a good deed to drive them out so that they do no more damage; but it is otherwise if another man drive my horses into a stranger's land where they do damage, there I may justify entry to drive them out, because their wrong-doing took its beginning in a stranger's wrong. But here, because the party might have his remedy if the corn were anywise destroyed, the taking was not lawful. And it is not like the case where things are in danger of being lost by water, fire, or such like, for there the destruction is without remedy against any man. And so this plea is not good" (*k*). Fisher J. [* 319] concurred. There is * little or nothing to be added to the statement of the law, though it may be

(*h*) Cp. Littleton J. in Y. B. 9 Ed. IV. 35; "If a man *by negligence* suffer his house to burn, I who am his neighbour may break down the house to avoid the danger to me, for if I let the house stand, it may burn so that I cannot quench the fire afterwards."

(*i*) Kingsmill, Rede, and Fisher are here found sitting together in Trinity term, 21 Hen. VII., A. D. 1506; according to Foss's "Judges of England," Rede was transferred from K. B. to C. P. only in October of that year, which seems inconsistent with the Year Book.

(*k*) 21 Hen. VII. 27, pl. 5; cp. 37 Hen. VI. 37, pl. 26; 6 Ed. IV. 8, pl. 18, which seems to extend the justification to entry to retake goods which have come on another's land by inevitable accident; see Story, Bailments, § 83 *a*, note.

doubted whether it is now likely ever to be strictly applied. Excuse of this kind is always more readily allowed if the possessor of the land has created or contributed to the necessity by his own fault, as where the grantor of a private right of way has obstructed it so that the way cannot be used except by deviation on his land (*l*).

Foxhunting not privileged.

At one time it was supposed that the law justified entering on land in fresh pursuit of a fox, because the destruction of noxious animals is to be encouraged; but this is not the law now. If it ever was, the reason for it has long ceased to exist (*m*). Practically foxhunters do well enough (in this part of the United Kingdom) with licence express or tacit.

Trespass *ab initio*.

There is a curious and rather subtle distinction between justification by consent and justification or excuse under authority of law. A possessor by consent, or a licensee, may commit a wrong by abusing his power, but he is not a trespasser. If I lend you a horse to ride to York, and you ride to Carlisle, I shall not have (under the old forms of pleading) a general action of trespass, but an action on the case. So if a lessee for years holds over, he is not a trespasser, because his entry was authorized by the lessor (*n*). But "when entry, authority, or licence is given to anyone by the law, and he doth abuse it, he shall be a trespasser *ab initio*," that is, the authority or justification is not only determined, but treated as if it had never existed. "The law gives authority to enter into a common inn or * tavern (*o*); so to the lord to distrain; to the [* 320] owner of the ground to distrain damage feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle; and such like . . . . But if he who enters into the inn or tavern doth a trespass, as if he carries away anything; or if the lord who distrains for rent (*p*), or the owner for damage feasant, works or kills the distress; or if he who enters to see waste break the house or stays there all

(*l*) Selby *v.* Nettlefold (1873) 9 Ch. 111.

(*m*) Paul *v.* Summerhayes (1878) 4 Q. B. D. 9.

(*n*) 21 Ed. IV. 76*b*, pl. 9.

(*o*) This is in respect of the public character of the innkeeper's employment.

(*p*) The liability of a distrainor for rent justly due, in respect of any subsequent irregularity, was reduced to the real amount of damage by 11 Geo. 2, c. 19, s. 19. Distrainors for damage feasant are still under the common law.

night; or if the commoner cuts down a tree; in these and the like cases the law adjudges that he entered for that purpose, and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*" (*q*). Or to state it less artificially, the effect of an authority given by law without the owner's consent is to protect the person exercising that authority from being dealt with as a trespasser so long—but so long only—as the authority is not abused. He is never doing a fully lawful act: he is rather an excusable trespasser, and becomes a trespasser without excuse if he exceeds his authority (*r*): "it shall be adjudged against the peace" (*s*). This doctrine has been applied in modern times to the lord of a manor taking an estray (*t*), and to a sheriff remaining in a house in possession of goods taken in execution for an unreasonably long time (*u*). It is applicable only when there has been some kind of active wrong-doing; not when there has been a mere [* 321] refusal to do something one ought * to do—as to pay for one's drink at an inn (*x*), or deliver up a distress upon a proper tender of the rent due (*y*). But it is to be observed that retaining legal posession after the expiration of authority is equivalent to a new taking, and therefore is a positive act: hence (it seems) the distinction between the liability of a sheriff, who takes possession of the execution debtor's goods, and of a distrainor; the latter only takes the goods into "the custody of the law," and "the goods being in the custody of the law, the distrainor is under no legal obligation actively to re-deliver them" (*z*). Formerly these refinements were important as determining the proper form of action. Under the Judicature Acts they seem to be obsolete for most purposes of civil liability, though it is still possible that a question of the measure of damages may involve the point of trespass *ab initio*. Thus in the case of the distrainor refusing to give up the goods, there was no doubt that trover or detinue would lie (*a*): so that under the present practice there would be nothing to discuss.

(*q*) The Six Carpenters' Case, 8 Co. Rep. 146 *a*, *b*.
(*r*) Cp. L. Q. R. ii. 313.
(*s*) 11 Hen. IV. 75, pl. 16.
(*t*) Oxley *v.* Watts (1785) 1 T. R. 12.
(*u*) Ash *v.* Dawnay (1852) 8 Ex. 237; 22 L. J. Ex. 59.
(*x*) Six Carpenters' Case, *supra*.
(*y*) West *v.* Nibbs (1847) 4 C. B. 172; 17 L. J. C. P. 150.
(*z*) West *v.* Nibbs, 4 C. B. at p. 184, per Wilde C. J.
(*a*) Wilde C. J. *l. c.*

X.—*Remedies.*

Taking or retaking goods.

The only peculiar remedy available for this class of wrongs is distress damage feasant, which, though an imperfect remedy, is so far a remedy that it suspends the right of action for the trespass. The distrainor "has an adequate satisfaction for his damage till he lose it without default in himself;" in which case he may still have his action (*b*). It does not seem that the retaking of goods taken by trespass extinguishes the true owner's right of * action, though it would [* 322] of course affect the amount of damages.

Costs where damages nominal.

Actions for merely trifling trespasses were formerly discouraged by statutes providing that when less than 40*s.* were recovered no more costs than damages should be allowed except on the judge's certificate that the action was brought to try a right, or that the trespass was "wilful and malicious:" a trespass after notice not to trespass on the plaintiff's lands was held to be "wilful and malicious," and special communication of such notice to the defendant was not required (*c*). But these and many other statutes as to costs were superseded by the general provisions of the Judicature Acts, and the rule that a plaintiff recovering less than 10*l.* damages in an action "founded on tort" gets no costs in a Superior Court unless by special certificate or order (*d*); and they are now expressly repealed (*e*).

The Court is therefore not bound by any fixed rule; but it might possibly refer to the old practice for the purpose of informing its discretion. It seems likely that the common practice of putting up notice-boards with these or the like words: "Trespassers will be prosecuted according to law"—words which are "if strictly construed, a wooden falsehood" (*f*), simple trespass not being punishable in courts of criminal jurisdiction—was originally intended to secure the benefit of these same statutes in the matter of costs. At this day it may be a question whether the Court would not be disposed to regard the threat of an impossible criminal prosecution as a fraud upon the public, * and [* 323] rather a cause for depriving the occupier of costs than

(*b*) Vaspor *v.* Edwards 12 Mod. 660, per Holt C. J.
(*c*) See Bowyer *v.* Cook (1847) 4 C. B. 236; 16 L. J. C. P. 177.
(*d*) County Courts Act 1867, s. 5, and 45 & 46 Vict. c. 57, s. 4; see "The Annual Practice," 1886–7, p. 112.
(*e*) 42 & 43 Vict. c. 59.
(*f*) F. W. Maitland, "Justice and Police," p. 13.

for awarding them (*g*). Several better and safer forms of notice are available; a common American one, "no trespassing," is as good as any.

Injunctions.

An injunction can be granted to restrain a continuing trespass, such as the laying and keeping of waterpipes under a man's ground without either his consent or justification by authority of law; and the plaintiff need not prove substantial damage to entitle himself to this form of relief (*h*). On the other hand the right to an injunction does not extend beyond the old common-law right to sue for damages: a reversioner cannot have an injunction without showing permanent injury to the reversion (*i*).

Of course it may be a substantial injury, though without any direct damage, to do acts on another man's land for one's own profit without his leave; for he is entitled to make one pay for the right to do them and his power of withholding leave is worth to him precisely what it is worth to the other party to have it (*k*).

Effect of changes in procedure.

Before the Common Law Procedure Acts an owner, tenant, or reversioner who had suffered undoubted injury might be defeated by bringing his action in the wrong form, as where he brought trespass and failed to show that he was in present possession at the time of the wrong done (*l*). But such cases can hardly occur now.

(*g*) At all events the threat of spring-guns, still not quite unknown, can do the occupier no good, for to set spring-guns is itself an offence.

(*h*) Goodson *v.* Richardson (1874) 9 Ch. 221.

(*i*) Cooper *v.* Crabtree (1882) 20 Ch. Div. 589. In Allen *v.* Martin (1875) 20 Eq. 462. the plaintiffs were in possession of part of the land affected.

(*k*) See 9 Ch. 224; 20 Ch. Div. 592.

(*l*) Brown *v.* Notley (1848) 3 Ex. 221; 18 L. J. Ex. 39; Pilgrim *v.* Southampton, &c. R. Co. (1849) 8 C. B. 25; 18 L. J. C. P. 330.

71 Ks W 176 126 N Y 514.

* CHAPTER X. [* 324]

NUISANCE.

Nuisance: public or private.

NUISANCE is the wrong done to a man by unlawfully disturbing him in the enjoyment of his property or, in some cases, in the exercise of a common right. The wrong is in some respects analogous to trespass, and the two may coincide, some kinds of nuisance being also continuing trespasses. The scope of nuisance, however, is wider. A nuisance may be public or private.

Public or common nuisances affect the Queen's subjects at large, or some considerable portion of them, such as the inhabitants of a town; and the person therein offending is liable to criminal prosecution (*a*). A public nuisance does not necessarily create a civil cause of action for any person; but it may do so under certain conditions. A private nuisance affects only one person or a determinate number of persons, and is the ground of civil proceedings only. Generally it affects the control, use or enjoyment of immoveable property; but this is not a necessary element according to the modern view of the law. Certainly the owner or master of a ship lying in harbour, for example, might be entitled to complain of a nuisance * created by an occupier [* 325] on the wharf or shore which made the ship uninhabitable.

Private right of action for public nuisance.

We shall first consider in what cases a common nuisance exposes the person answerable for it to civil as well as criminal process, in other words, is actionable as well as indictable.

"A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all

(*a*) There was formerly a mandatory writ for the abatement of public nuisances in cities and corporate towns and boroughs. See the curious precedent in F. N. B. 185 D. Apparently the Queen's Bench Division still has in theory jurisdiction to grant such writs (as distinct from the common judgment on an indictment); see Russell on Crimes, i. 440.

her Majesty's subjects" (*b*). Omission to repair a highway, or the placing of obstructions in a highway or public navigable river, is a familiar example.

In order to sustain an indictment for nuisance it is enough to show that the exercise of a common right of the Queen's subjects has been sensibly interfered with. It is no answer to say that the state of things causing the obstruction is in some other way a public convenience. Thus it is an indictable nuisance at common law to lay down a tramway in a public street to the obstruction of the ordinary traffic, although the people who use the cars and save money and time by them may be greater in number than those who are obstructed in their use of the highway in the manner formerly accustomed (*c*).

It is also not material whether the obstruction interferes with the actual exercise of the right as it is for the time being exercised. The public are entitled, for [* 326] example, to * have the whole width of a public road kept free for passing and repassing, and an obstruction is not the less a nuisance because it is on a part of the highway not commonly used, or otherwise leaves room enough for the ordinary amount of traffic (*d*).

Further discussion and illustration of what amounts to an indictable nuisance must be sought in works on the criminal law.

Special damage must be shown.

A private action can be maintained in respect of a public nuisance by a person who suffers thereby some particular loss or damage beyond what is suffered by him in common with all other persons affected by the nuisance. Interference with a common right is not of itself a cause of action for the individual citizen. Particular damage (*e*) consequent on the interference is. If a man digs a trench across a highway, I cannot sue him simply because the trench prevents me from passing along the highway as I am entitled to do; for that is an

(*b*) Criminal Code (Indictable Offences) Bill, 1879 (as amended in Committee), s. 150; cp. Stephen, Digest of Criminal Law, art. 176, and illustrations thereto, and the Indian Penal Code, s. 268.

(*c*) R. *v.* Train (1862) 2 B. & S. 640; 31 L. J. M. C. 169. The tramways now in operation in many cities and towns have been made under statutory authority.

(*d*) Turner *v.* Ringwood Highway Board (1870) 9 Eq. 418. Compare the similar doctrine as to obstruction of lights, *infra*.

(*e*) "Particular damage" and "special damage" are used indifferently in the authorities; the former seems preferable, for "special damage," as we have seen, has another technical meaning in the law of defamation.

inconvenience inflicted equally on all men who use the road. But if, while I am lawfully passing along after dark, I fall into this trench so that I break a limb, or goods which I am carrying are spoiled, I shall have my action; for this is a particular damage to myself resulting from the common nuisance, and distinct from the mere obstruction of the common right of passage which constitutes that nuisance (*f*). If * a [* 327] trader is conveying his goods in barges along a navigable river, and by reason of the navigation being unlawfully obstructed has to unload his merchandise and carry it overland at an increased expense, this is a particular damage which gives him a right of action (*g*). Though it is a sort of consequence likely to ensue in many individual cases, yet in every case it is a distinct and specific one. Where this test fails, there can be no particular damage in a legal sense. If the same man is at divers times delayed by the same obstruction, and incurs expense in removing it, this is not of itself sufficient particular damage; the damage, though real, is "common to all who might wish, by removing the obstruction, to raise the question of the right of the public to use the way" (*h*). The diversion of traffic or custom from a man's door by an obstruction of a highway, whereby his business is interrupted, and his profits diminished, seems to be too remote a damage to give him a right of private action (*i*), unless indeed the obstruction is such as materially to impede the immediate access to the plaintiff's place

(*f*) Y. B. 27 Hen. VIII. 27, pl. 10. Action for stopping a highway, whereby it seems the plaintiff was deprived of the use of his own private way abutting thereon (the statement is rather obscure) per Fitzherbert, a man shall have his action for a public nuisance if he is more incommoded than others. "If one make a ditch across the high road, and I come riding along the road at night, and I and my horse are thrown in the ditch so that I have thereby great damage and annoyance, I shall have my action against him who made this ditch, because I am more damaged than any other man" Held that sufficient particular damage was laid.

(*g*) Rose *v.* Miles (1815) 4 M. & S. 101, and in Bigelow L. C. 460.

(*h*) Winterbottom *v.* Lord Derby (1867) L. R. 2 Ex. 316, 322.

(*i*) Rickot *v.* Metrop. R. Co. (1867) L. R. 2 H. L. at pp. 188, 199. See the comments of Willes J. in Beckett *v.* Midland R. Co. L. R. 3 C. P. at p. 100, where Wilkes *v.* Hungerford Market Co. (1835) 2 Bing. N. C. 281 is treated as overruled by the remarks of Lord Chelmsford and Lord Cranworth. Probably this would not be accepted in other jurisdictions where the common law is received. In Massachusetts, at least, Wilkes *v.* Hungerford Market Co. was adopted by the Supreme Court in a very full and careful judgment: Stetson *v.* Faxon (1837) 19 Pick. 147.

of business more than other men's, and amounts to [* 328] something like blocking * up his doorway (*k*). Whether a given case falls under the rule or the exception must depend on the facts of that case: and what is the true principle, and what the extent of the exception, is open to some question (*l*). If horses and waggons are kept standing for an unreasonable time in the highway opposite a man's house, so that the access of customers is obstructed, the house is darkened, and the people in it are annoyed by bad smells, this damage is sufficiently "particular, direct, and substantial" to entitle the occupier to maintain an action (*m*).

Private nuisance, what.

The conception of private nuisance was formerly limited to injuries done to a man's freehold by a neighbour's acts, of which stopping or narrowing rights of way and flooding land by the diversion of water courses appear to have been the chief species (*n*). In the modern authorities it includes all injuries to an owner or occupier in the enjoyment of the property of which he is in possession, without regard to the quality of the ten- [* 329] ure (*o*). Blackstone's phrase is * "anything done to the hurt or annoyance of the land, tenements or hereditaments of another" (*p*)—that is so done without any lawful ground of justification or excuse. The ways in which this may happen are indefinite in number, but fall for practical purposes into certain well recognized classes.

(*k*) Fritz *v.* Hobson (1880) 14 Ch. D. 542.

(*l*) In Fritz *v.* Hobson (last note) Fry J. did not lay down any general proposition. How far the principle of Lyon *v.* Fishmongers' Company (1876) 1 App. Ca. 662, is really consistent with Ricket *v.* Metrop. R. Co. is a problem that can be finally solved only by the House of Lords itself. According to Lyon *v.* Fishmongers' Company it should seem that blocking the access to a street is (if not justified) a violation of the distinct private right of every occupier in the street: and such rights are not the less private and distinct because they may be many; see Harrop *v.* Hirst (1868) L. R. 4 Ex. 43. In this view it is difficult to see that a loss of custom is otherwise than a natural and probable consequence of the wrong. And cp. the case in 27 Hen. VIII. cited above, p. 326. In Ricket's case Lord Westbury strongly dissented from the majority of the Lords present; L. R. 2 H. L. at p. 200.

(*m*) Benjamin *v.* Storr (1874) L. R. 9 C. P. 400. Compare further, as to damage from unreasonable user of a highway, Harris *v.* Mobbs (1878) 3 Ex. D. 268; Wilkins *v.* Day (1883) 12 Q. B. D. 110.

(*n*) F. N. B. "Writ of Assize of Nuisance" 183 I. *sqq.*

(*o*) See per Jessel M. R. in Jones *v.* Chappell (1875) 20 Eq. at p. 543.

(*p*) Comm. iii. 216.

Some acts are nuisances, according to the old authorities and the course of procedure on which they were founded, which involve such direct interference with the rights of a possessor as to be also trespasses, or hardly distinguishable from trespasses. "A man shall have an assize of nuisance for building a house higher than his house, and so near his, that the rain which falleth upon that house falleth upon the plaintiff's house" (*q*). And it is stated to be a nuisance if a tree growing on my land overhangs the public road, or my neighbour's land (*r*). In this class of cases nuisance means nothing more than encroachment on the legal powers and control of the public or of one's neighbour. It is generally, though not necessarily (*s*), a continuing trespass, for which however, in the days when forms of action were strict and a mistake in seeking the proper remedy was fatal, there was a greater variety and choice of remedies than for ordinary trespasses. Therefore it is in such a case needless to inquire, except for the assessment of damages, whether there is anything like nuisance in the popular sense. Still there is a real distinction between trespass and nuisance even when they are combined: the cause of action in trespass is interference with the right of a possessor in itself, while in nuisance it * is [* 330] the incommodity which is proved in fact to be the consequence, or is presumed by the law to be the natural and necessary consequence, of such interference: thus an overhanging roof or cornice is a nuisance to the land it overhangs because of the necessary tendency to discharge rain-water upon it (*t*). Kinds of nuisance, affecting— 1. Ownership.

Another kind of nuisance consists in obstructions of rights of way and other rights over the property of others. "The parishioners may pull down a wall which is set up to their nuisance in their way to the church" (*u*). In modern times the most frequent and important examples of this class are cases of interference with rights to light. Here the right itself is a right not of dominion, but of use; and therefore no 2. *Iura in re aliena.*

(*q*) F. N. B. 184 D.; Penruddock's ca. 5 Co. Rep. 100 *b*; Fay *v.* Prentice (1845) 1 C. B. 829; 14 L. J. C. P. 298.

(*r*) Best J. in Earl of Lonsdale *v.* Nelson (1823) 2 B. & C. 302, 311.

(*s*) Fay *v.* Prentice, *supra*, where the Court was astute to support the declaration after verdict.

(*t*) Baten's ca. 9 Co. Rep. 53 *b*.

(*u*) F. N. B. 185 B.

wrong is done (*v*) unless and until there is a sensible interference with its enjoyment, as we shall see hereafter. But it need not be proved that the interference causes any immediate harm or loss. It is enough that a legal right of use and enjoyment is interfered with by conduct which, if persisted in without protest, would furnish evidence in derogation of the right itself (*x*).

3. Convenience and enjoyment.

A third kind, and that which is most commonly spoken of by the technical name, is the continuous doing of something which interferes with another's health or comfort in the occupation of his property, such as carrying on a noisy or offensive trade.

Measure of nuisance.

What amount of annoyance or inconvenience will amount to a nuisance in point of law cannot, by the [* 331] nature * of the question, be defined in precise terms. Attempts have been made to set more or less arbitrary limits to the jurisdiction of the Court, especially in cases of miscellaneous nuisance, as we may call them, but they have failed in every direction.

Injury to health need not be shown.

(a.) It is not necessary to constitute a private nuisance that the acts or state of things complained of should be noxious in the sense of being injurious to health. It is enough that there is a material interference with the ordinary comfort and convenience of life —"the physical comfort of human existence"—by an ordinary and reasonable standard (*y*); there must be something more than mere loss of amenity (*z*), but there need not be positive hurt or disease.

Plaintiff not disentitled by having come to the nuisance.

(b.) In ascertaining whether the property of the plaintiff is in fact injured, or his comfort and convenience in fact materially interfered with, by an alleged nuisance, regard is had to the character of the neighbourhood and the pre-existing circumstances (*a*). But the fact that the plaintiff was already exposed to some inconvenience of the same kind will not of itself deprive him of his remedy. Even if there was already a

(*v*) Otherwise as to public ways; see Turner *v.* Ringwood Highway Board (1870) 9 Eq. 418.

(*x*) Harrop *v.* Hirst (1868) L. R. 4 Ex. 43.

(*y*) Walter *v.* Selfe, 4 De G. & Sm. 315, 321, 322 (Knight Bruce V.-C., 1851); Crump *v.* Lambert (1867) 3 Eq. 409.

(*z*) Salvin *v.* North Brancepeth Coal Co. (1874) 9 Ch. 705; see judgment of James L. J. at pp. 709, 710.

(*a*) St. Helen's Smelting Co. *v.* Tipping (1865) 11 H. L. C. 642; Sturges *v.* Bridgman (1879) 11 Ch. Div. at p. 865.

nuisance, that is not a reason why the defendant should set up an additional nuisance (*b*). The fact that other persons are wrong-doers in the like sort is no excuse for a wrong-doer. If it is said "This is but one nuisance among many," the answer is that, if the * others were away, this one remaining [* 332] would clearly be a wrong; but a man cannot be made a wrong-doer by the lawful acts of third persons, and if it is not a wrong now, a prescriptive right to continue it in all events might be acquired under cover of the other nuisances; therefore it must be wrongful from the first (*c*). Neither does it make any difference that the very nuisance complained of existed before the plaintiff became owner or occupier. It was at one time held that if a man came to the nuisance, as was said, he had no remedy (*d*); but this has long ceased to be law as regards both the remedy by damages (*e*) and the remedy by injunction (*f*). The defendant may in some cases justify by prescription, or the plaintiff be barred of the most effectual remedies by acquiescence. But these are distinct and special grounds of defence, and if relied on must be fully made out by appropriate proof.

Further, the wrong and the right of action begin only when the nuisance begins. Therefore if Peter has for many years carried on a noisy business on his own land, and his neighbour John makes a new building on his own adjoining land, in the occupation whereof he finds the noise, vibration, or the like, caused by Peter's business to be a nuisance, Peter cannot justify continuing his operations as against John by showing that before John's building was occupied, John or his predecessors in title made no complaint (*g*).

Innocent or necessary character *per se* of offensive occupation is no answer.

(c.) Again a nuisance is not justified by showing [* 333] that * the trade or occupation causing the annoyance is, apart from that annoyance, an innocent or laudable one. "The building of a lime kiln is good and profitable; but if it be built so near a house that

(*b*) Walter *v.* Selfe, *supra.*

(*c*) Crossley *v.* Lightowler (1867) 2 Ch. 478. The same point was (among others) decided many years earlier (1849) in Wood *v.* Waud, 3 Ex. 748; 18 L. J. Ex. 305.

(*d*) Blackstone ii. 403.

(*e*) *E. g.* St. Helen's Smelting Co. *v.* Tipping (1865) 11 H. L. C. 642.

(*f*) Tipping *v.* St. Helen's Smelting Co. (1865) 1 Ch. 66, a suit for injunction on the same facts.

(*g*) Sturges *v.* Bridgman (1879) 11 Ch. Div. 852.

when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it" (*h*). "A tan-house is necessary, for all men wear shoes ; and nevertheless it may be pulled down if it be erected to the nuisance of another. In like manner of a glass-house ; and they ought to be erected in places convenient for them" (*i*). So it is an actionable nuisance to keep a pigstye so near my neighbour's house as to make it unwholesome and unfit for habitation, though the keeping of swine may be needful for the sustenance of man (*k*). Learned and charitable foundations are commended in sundry places of our books ; but the fact that a new building is being erected by a college for purposes of good education and the advancement of learning will not make it the less a wrong if the sawing of stone by the builders drives a neighbouring inhabitant out of his house.

Convenience of place *per se* is no answer.

(d.) Where the nuisance complained of consists wholly or chiefly in damage to property, such damage must be proved as is of appreciable magnitude and apparent to persons of common intelligence ; not merely something discoverable only by scientific tests (*l*). But where material damage in this sense is proved, or material discomfort according to a sober and reasonable standard of comfort, it is no answer to say that the offending work or manufacture is carried on at a place [* 334] in itself proper and convenient for * the purpose. A right to do something that otherwise would be a nuisance may be established by prescription, but nothing less will serve. Or in other words a place is not in the sense of the law convenient for me to burn bricks in, or smelt copper, or carry on chemical works, if that use of the place is convenient to myself but creates a nuisance to my neighbour (*m*).

Modes of annoyance.

(e.) No particular combination of sources of annoy-

(*h*) Aldred's ca. 9 Co. Rep. 59 *a*.

(*i*) Jones *v.* Powell, Palm. 539, approved and explained by Ex. Ch. in Bamford *v.* Turnley (1862) 3 B. & S. 66 ; 31 L. J. Q. B. 286. As to "convenient" see next paragraph.

(*k*) Aldred's ca. *supra*. Cp. Broder *v.* Saillard (1876) 2 Ch. D. 692, 701 (Jessel M. R.).

(*l*) Salvin *v.* North Brancepeth Coal Co. (1874) 9 Ch. 705.

(*m*) St. Helen's Smelting Co. *v.* Tipping (1865) 11 H. L. C. 642; Bigelow L. C. 454; Bamford *v.* Turnley (1862) Ex. Ch. 3 B. & S. 66; 31 L. J. Q. B. 286; Carey *v.* Ledbitter (1862–3) 13 C. B. N. S. 470; 32 L. J. C. P. 104. These authorities overrule Hole *v.* Barlow (1858) 4 C. B. N. S. 334; 27 L. J. C. P. 207; see Shotts Iron Co. *v.* Inglis (1882) 7 App. Ca. Sc. at p. 528.

ance is necessary to constitute a nuisance, nor are the possible sources of annoyance exhaustively defined by any rule of law. "Smoke, unaccompanied with noise or noxious vapour, noise alone, offensive vapours alone, although not injurious to health, may severally constitute a nuisance to the owner of adjoining or neighbouring property" (*n*). The persistent ringing and tolling of large bells (*o*), the loud music, shouting, and other noises attending the performances of a circus (*p*), the collection of a crowd of disorderly people by a noisy entertainment of music and fireworks (*q*), to the * grave annoyance of dwellers in the neigh- [* 335] bourhood, have all been held to be nuisances and restrained by the authority of the Court. The use of a dwelling-house in a street of dwelling-houses, in an ordinary and accustomed manner, is not a nuisance though it may produce more or less noise and inconvenience to a neighbour. But the conversion of part of a house to an unusual purpose, or the simple maintenance of an arrangement which offends neighbours by noise or otherwise to an unusual and excessive extent, may be an actionable nuisance. Many houses have stables attached to them, but a man who turns the whole ground floor of a London house into a stable, or otherwise keeps a stable so near a neighbour's living rooms that the inhabitants are disturbed all night (even though he has done nothing beyond using the arrangements of the house as he found them), does so at his own risk (*r*).

"In making out a case of nuisance of this character, there are always two things to be considered, the right of the plaintiff, and the right of the defendant. If the houses adjoining each other are so built that from the commencement of their existence it is manifest that

(*n*) Romilly M. R., Crump *v.* Lambert (1867) 3 Eq. at p. 412.

(*o*) Soltau *v.* De Held (1851) 2 Sim. N. S. 133. The bells belonged to a Roman Catholic church; the judgment points out (at p. 160) that such a building is not a church in the eye of the law, and cannot claim the same privileges as a parish church in respect of bell-ringing.

(*p*) Inchbald *v.* Barrington (1869) 4 Ch. 388: the circus was eighty-five yards from the plaintiff's house, and "throughout the performance there was music, including a trombone and other wind instruments and a violoncello, and great noise, with shouting and cracking of whips."

(*q*) Walker *v.* Brewster (1867) 5 Eq. 24. It was not decided whether the noise would alone have been a nuisance, but Wickens V.-C. strongly inclined to think it would, see at p. 34.

(*r*) Ball *v.* Ray (1873) 8 Ch. 467; Broder *v.* Saillard (1876) 2 Ch. D. 692.

each adjoining inhabitant was intended to enjoy his own property for the ordinary purposes for which it and all the different parts of it were constructed, then so long as the house is so used there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But, on the other hand, if either party turns his house, or any portion of it, to unusual purposes in such a manner as to produce a substantial injury to his neighbour, it appears to me that that is not according to principle or authority a reasonable use of his own property; and his neighbour, showing substantial injury, is entitled to protection" (*s*).

[* 336]

Injury common to plaintiff with others.

(**f.**) Where a distinct private right is infringed, though it be only a right enjoyed in common with other persons, it is immaterial that the plaintiff suffered no specific injury beyond those other persons, or no specific injury at all. Thus any one commoner can sue a stranger who lets his cattle depasture the common (*t*); and any one of a number of inhabitants entitled by local custom to a particular water supply can sue a neighbour who obstructs that supply (*u*). It should seem from the *ratio decidendi* of the House of Lords in Lyon *v.* Fishmongers' Company (*x*), that the rights of access to a highway or a navigable river incident to the occupation of tenements thereto adjacent are private rights within the meaning of this rule (*y*).

Obstruction of lights.

A species of nuisance which has become prominent in modern law, by reason of the increased closeness and height of buildings in towns, is the obstruction of light: often the phrase "light and air" is used, but the addition is useless if not misleading, inasmuch as a specific right to the access of air over a neighbour's land is not known to the law (*z*).

It seems proper (though at the risk of digressing from the law of Torts into the law of Easements) to state here the rules on this head as settled by the decisions of the last twenty years or thereabouts.

(*s*) Lord Selborne L. C., 8 Ch. at p. 469.
(*t*) Notes to Mellor *v.* Spateman, 1 Wms. Saund. 626.
(*u*) Harrop *v.* Hirst (1868) L. R. 4 Ex. 43.
(*x*) 1 App. Ca. 662.
(*y*) Fritz *v.* Hobson (1880) 14 Ch. D. 542, *supra*, p. 328.
(*z*) City of London Brewery Co. *v.* Tennant (1873) 9 Ch. at p. 221; Webb *v.* Bird (1862) Ex. Ch. 13 C. B. N. S. 841; 31 L. J. C. P. 335; Bryant *v.* Lefever (1879) 4 C. P. Div. 172, especially per Cotton L. J. at p. 180; Harris *v.* De Pinna (1886) 33 Ch. Div. 238, per Chitty, J. at p. 250, and Cotton, L. J. at p. 259.

Nature of the right.

* The right to light, to begin with, is not a [* 337] natural right incident to the ownership of windows, but an easement to which title must be shown by grant (*a*) express or implied, or by prescription at common law, or under the Prescription Act. The Prescription Act has not altered the nature or extent of the right, but has only provided a new mode of acquiring and claiming it (*b*), without taking away any mode which existed at common law (*c*). The right can be claimed only in respect of a building; the use of an open piece of ground for a purpose requiring light will not create an easement against an adjacent owner (*d*).

Any substantial diminution is a wrong.

Assuming the right to be established, there is a wrongful disturbance if the building in respect of which it exists is so far deprived of access of light as to render it materially less fit for comfortable or beneficial use or enjoyment in its existing condition, if a dwelling-house, for ordinary habitation; if a warehouse or shop, for the conduct of business (*e*).

This does not mean that an obstruction is not wrongful if it leaves sufficient light for the conduct of the business or occupation carried on in the dominant tenement for the time being. The question is not what is the least amount of light the plaintiff can live or work with, but whether the light, as his tenement was entitled to it and enjoyed * it, has been substantially dimin- [* 338] ished. Even if a subdued or reflected light is better for the plaintiff's business than a direct one, he is not the less entitled to regulate his light for himself (*f*).

(*a*) Notwithstanding the doubts expressed by Littledale J. in Moore *v.* Rawson (1824) 3 B. & C. at p. 340 see per Lord Selborne, Dalton *v.* Angus (1881) 6 App. Ca. at p. 794, and Lord Blackburn, *ib.* 823, and the judgments and opinions in that case *passim* as to the peculiar character of negative easements.

(*b*) Kelk *v.* Pearson (1871) 6 Ch. at pp. 811, 813; cf. 9 Ch. 219.

(*c*) Aynsley *v.* Glover (1875) 10 Ch. 283. Since the Prescription Act, however, the formerly accustomed method of claiming under the fiction of a lost grant appears to be obsolete.

(*d*) See Potts *v.* Smith (1868) 6 Eq. 311, 318.

(*e*) Kelk *v.* Pearson (1871) 6 Ch. 809, 811; City of London Brewery Co. *v.* Tennant (1873) 9 Ch. at p. 216.

(*f*) Yates *v.* Jack (1866) 1 Ch. 295. Lanfranchi *v.* Mackenzie, 4 Eq. 421 (1867, before Malins V. C.) seems to have been decided, on the whole, on the ground that there was not any material diminution. So far as it suggests that there is a distinction in law between ordinary and extraordinary amounts of light, or that a plaintiff claiming what is called an extraordinary amount ought to show that the defendant had notice of the nature of his business, it cannot be accepted as authority.

Supposed rule or presumption as to angle of 45°.

For some years it was supposed, by analogy to a regulation in one of the Metropolitan Local Management Acts as to the proportion between the height of new buildings and the width of streets (*g*), that a building did not constitute a material obstruction in the eye of the law, or at least was presumed not to be such, if its elevation subtended an angle not exceeding 45° at the base of the light alleged to be obstructed, or, as it was sometimes put, left 45° of light to the plaintiff. But it has been conclusively declared by the Court of Appeal that there is no such rule (*h*). Every case must be dealt with on its own facts. The statutory regulation is framed on considerations of general public convenience, irrespective of private titles. Where an individual is entitled to more light than the statute would secure for him, there is no warrant in the statute, or in anything that can be thence inferred, for depriving him of it.

Enlargement or alteration of lights.

An existing right to light is not lost by enlarging, rebuilding, or altering (*i*), the windows for which access of light is claimed. So long as the ancient lights, or a [* 339] * substantial part thereof (*k*), remain substantially capable of continuous enjoyment (*l*), so long the existing right continues and is protected by the same remedies (*m*).

It makes no difference that the owner of a servient tenement may, by the situation and arrangement of the buildings, be unable to prevent a right being acquired in respect of the new light otherwise than by obstructing the old light also (*n*). For there is no

(*g*) 25 & 26 Vict. c. 102, s. 85.

(*h*) Parker *v.* First Avenue Hotel Co. (1883) 24 Ch. Div. 282; Ecclesiastical Commissioners *v.* Kino (1880) 14 Ch. Div. 213.

(*i*) Tapling *v.* Jones (1865) 11 H. L. C. 290; 34 L. J. C. P. 342, Aynsley *v.* Glover (1874-5) 18 Eq. 544; 10 Ch. 283; Ecclesiastical Commissioners *v.* Kino, 14 Ch. Div. 213, Greenwood *v.* Hornsey (1886) 33 Ch. D. 471.

(*k*) Newson *v.* Pender (1884) 27 Ch. Div. 43, 61. It is not necessary that the "structural identity" of the old windows should be preserved; the right is to light as measured by the ancient apertures, but not merely as incident to certain defined apertures in a certain place: Scott *v.* Pape (1886) 31 Ch. Div. 554; National Provincial Plate Glass Insurance Co. *v.* Prudential Assurance Co. (1877) 6 Ch. D. 757. But there must at all events be a definite mode of access; Harris *v.* De Pinna (1886) 33 Ch. Div. 238.

(*l*) The alteration or rebuilding must be continuous enough to show that the right is not abandoned; see Moore *v.* Rawson (1824) 3 B. & C. 332. All the local circumstances will be considered: Bullers *v.* Dickinson (1885) 29 Ch. D. 155.

(*m*) Straight *v.* Burn (1869) 5 Ch. per Giffard L. J. at p. 167.

(*n*) Tapling *v.* Jones (1865) 11 H. L. C. 290; 34 L. J. C. P. 342.

such thing as a specific right to obstruct new lights. A man may build on his own land, and he may build so as to darken any light which is not ancient (as on the other hand it is undoubted law that his neighbour may open lights overlooking his land), but he must do it so as not to interfere with lights in respect of which a right has been acquired.

"Nuisance" to market or ferry.

Disturbing the private franchise of a market or a ferry is commonly reckoned a species of nuisance in our books (*o*). But this classification seems rather to depend on accidents of procedure than on any substantial resemblance between interference with peculiar rights of this kind and such injuries to the enjoyment of common rights of property as we have been considering. The quasi proprietary right to a market or a ferry is of such a nature that the kind of disturbance called "nuisance" in the old books is the only * way [* 340] in which it can be violated at all. If disturbing a market is a nuisance, an infringement of copyright must be a nuisance too, unless the term is to be conventionally restricted to the violation of rights not depending on any statute.

Remedies for nuisance.

The remedies for nuisance are threefold: abatement, damages, and injunction: of which the first is by the act of the party aggrieved, the others by process of law. Damages are recoverable in all cases where nuisance is proved, but in many cases are not an adequate remedy. The more stringent remedy by injunction is available in such cases, and often takes the place of abatement, where that would be too hazardous a proceeding.

Abatement.

The abatement of obstructions to highways, and the like, is still of importance as a means of asserting public rights. Private rights which tend to the benefit of the public, or a considerable class of persons, such as rights of common, have within recent times been successfully maintained in the same manner, though not without the addition of judicial proceeding (*p*). It is decided that not only walls, fences, and such like encroachments which obstruct rights of common may be removed, but a house wrongfully built on a common may be pulled

---

(*o*) Blackst. Comm. iii. 218.

(*p*) Smith *v.* Earl Brownlow (1869) 9 Eq. 241 (the case of Berkhamstead Common); Williams on Rights of Common, 135.

down by a commoner if it is not removed after notice (*q*) within a reasonable time (*r*).

[* 341] * If another man's tree overhangs my land, I may lawfully cut the overhanging branches (*s*); and in these cases where the nuisance is in the nature of a trespass, and can be abated without entering on another's land, it does not appear that the wrong doer is entitled to notice. But if the nuisance is on the wrong-doer's own tenement, he ought first to be warned and required to abate it himself (*t*). After notice and refusal, entry on the land to abate the nuisance may be justified, but it is a hazardous course at best for a man thus to take the law into his own hands, and in modern times it can seldom, if ever, be advisable.

Notice to wrongdoer.

In the case of abating nuisances to a right of common, notice is not strictly necessary unless the encroachment is a dwelling-house in actual occupation; but if there is a question of right to be tried, the more reasonable course is to give notice (*u*). The same rule seems on principle to be applicable to the obstruction of a right of way. As to the extent of the right, "where a fence has been erected upon a common, inclosing and separating parts of that common from the residue, and thereby interfering with the rights of the commoners, the latter are not by law restrained in the exercise of those rights to pulling down so much of that fence as it may be necessary for them to remove for the purpose of enabling their cattle to enter and feed upon the residue of the common, but they are entitled to consider the whole of that fence so erected upon the common a nuisance, and to remove it accordingly" (*x*).

(*q*) Pulling down the house without notice while there are people in it is a trespass: Perry *v.* Fitzhowe (1845) 8 Q. B. 757; 15 L. J. Q. B. 239; Jones *v.* Jones (1862) 1 H. & C. 1; 31 L. J. Ex. 506; following Perry *v.* Fitzhowe with some doubt. The case of a man pulling down buildings wrongfully erected on his own land is different, *ib.*, Burling *v.* Read (1850) 11 Q. B. 904; 19 L. J. Q. B. 291.

(*r*) Davies *v.* Williams (1851) 16 Q. B. 546; 20 L. J. Q. B. 330.

(*s*) Norris *v.* Baker, 1 Rolle's Rep. 393, per Croke, Lonsdale *v.* Nelson, 2 B. & C. 311, per Best.

(*t*) This has always been understood to be the law, and seems to follow *a fortiori* from the doctrine of Perry *v.* Fitzhowe, *supra*.

(*u*) Per James L. J., Commissioners of Sewers *v* Glasse (1872) 7 Ch. at p. 464.

(*x*) Bayley J. in Arlett *v.* Ellis (1827) 7 B. & C. 346, 362, and earlier authorities there cited.

* It is doubtful whether there is any private [* 342] right to abate a nuisance consisting only in omission except where the person aggrieved can do it without leaving his own tenement in respect of which he suffers, and perhaps except in cases of urgency such as to make the act necessary for the immediate safety of life or property. "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the person who committed them; but there is no decided case which sanctions the abatement by an individual of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them . . . The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has risen to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances persons should not take the law into their own hands, but follow the advice of Lord Hale and appeal to a court of justice" (*y*). Nuisances of omission.

In every case the party taking on himself to abate a nuisance must avoid doing any unnecessary damage, as is shown by the old form of pleading in justification. Thus it is lawful to remove a gate or barrier which obstructs a right of way, but not to break or deface it beyond what is necessary for the purpose of removing it. And where a structure, say a dam or weir across a stream, is in part lawful and in part unlawful, a party abating that which is unlawful cannot justify interference with the rest. He must distinguish them at his peril (*z*). But this does not * mean that the [* 343] wrong-doer is always entitled to have a nuisance abated in the manner most convenient to himself. The convenience of innocent third persons or of the public may also be in question. And the abator cannot justify doing harm to innocent persons which he might have avoided. In such a case, therefore, it may be necessary and proper "to abate the nuisance in a manner more onerous to the wrong-doer" (*a*). Practically the remedy of abatement is now in use only as to rights of common (as we have already hinted), rights of way, and some-

(*y*) Best J. in Earl of Lonsdale *v.* Nelson (1823) 2 B. & C. at p. 311.

(*z*) Greenslade *v.* Halliday (1830) 6 Bing. 379.

(*a*) Roberts *v.* Rose (1865) Ex. Ch. L. R. 1 Ex. 82, 89.

times rights of water; and even in those cases it ought never to be used without good advisement.

Old writs.

Formerly there were processes of judicial abatement available for freeholders under the writ *Quod permittat* and the assize of nuisance (*b*). But these were cumbrous and tedious remedies, and, like the other forms of real action, were obsolete in practice long before they were finally abolished (*c*), the remedies by action on the case at law and by injunction in the Court of Chancery having superseded them.

Damages.

There is not much to be said of the remedy in damages as applicable to this particular class of wrongs. Persistence in a proved nuisance is stated to be a just cause for giving exemplary damages (*d*). There is a place for nominal damages in cases where the nuisance consists merely in the obstruction of a right of legal enjoyment, such as a right of common, which does not cause any specific harm or loss to the plaintiff. At [* 344] common law * damages could not be awarded for any injury received from the continuance of a nuisance since the commencement of the action; for this was a new cause of action for which damages might be separately recovered. But under the present procedure damages in respect of any continuing cause of action are assessed down to the date of the assessment (*e*).

Injunctions.

The most efficient and flexible remedy is that of injunction. Under this form the Court can prevent that from being done which, if done, would cause a nuisance; it can command the destruction of buildings (*f*) or the cessation of works (*g*) which violate a neigh-

(*b*) F. N. B. 124 H., 183 L.; Baten's Ca. 9 Co. Rep. 55 *a*; Blackst. Comm. iii. 221.

(*c*) See note (A) to Penruddock's Ca. 5 Co. Rep. 100 *b*, in ed. Thomas & Frazer, 1826.

(*d*) Blackst. Comm. iii. 220.

(*e*) Rules of the Supreme Court, 1883, Ord. XXXVI. r. 58 (no. 482). The like power had already been exercised by the Court when damages were given in addition to or in substitution for an injunction under Lord Cairns' Act, 21 & 22 Vict. c. 27, now repealed by the Statute Law Revision and Civil Procedure Act, 1883, 46 & 47 Vict. c. 49. See Fritz *v.* Hobson (1880) 14 Ch. D. 542, 557.

(*f*) *E.g.* Kelk *v.* Pearson (1871) 6 Ch. 809.

(*g*) The form of order does not go to prohibit the carrying on of such and such operations absolutely, but "so as to cause a nuisance to the plaintiff," or like words: see Lingwood *v.* Stowmarket Co. (1865) 1 Eq. 77, 336, and other precedents in Seton, Pt. II. ch. 5, s. 5. See addenda page xxxii.

bour's rights; where there is a disputed question of right between the parties, it can suspend the operations complained of until that question is finally decided; and its orders may be either absolute or conditional upon the fulfilments by either or both of the parties of such undertakings as appear just in the particular case (*h*).

It is a matter of common learning and practice that an injunction is not, like damages, a remedy (as it is said) *ex * debito iustitiae*. Whether it shall [* 345] be granted or not in a given case is in the judicial discretion of the Court, now guided by principles which have become pretty well settled. In order to obtain an injunction it must be shown that the injury complained of as present or impending is such as by reason of its gravity, or its permanent character, or both, cannot be adequately compensated in damages (*i*). The injury must be either irreparable or continuous (*k*). This remedy is therefore not appropriate for damage which is in its nature temporary and intermittent (*l*), or is accidental and occasional (*m*), or for an interference with legal rights which is trifling in amount and effect (*n*).

Apprehension of future mischief from something in itself lawful and capable of being done without creating a nuisance is no ground for an injunction (*o*). "There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial" (*p*). But where a nuisance is shown to exist, all the probable consequences are taken into account in

---

(*h*) Thus where the complaint was of special damage or danger from something alleged to be a public nuisance, an interlocutory injunction has been granted on the terms of the plaintiff bringing an indictment; Hepburn *v.* Lordan (1865) 2 H. & M. 345, 352.

(*i*) Cooke *v.* Forbes, 5 Eq. 166, 173 (Page Wood V.-C. 1867); A.-G. *v.* Sheffield &c. Co. (next note but one).

(*k*) Page Wood L. J. 4 Ch. at p. 81.

(*l*) A.-G. *v.* Sheffield Gas Consumers' Co. (1853) 3 D. M. G. 304 (breaking up streets to lay gas pipes) followed by A.-G. *v.* Cambridge Consumers' Gas Co. 1868) 4 Ch. 71.

(*m*) Cooke *v.* Forbes, *supra* (escape of fumes from works where the precautions used were shown to be as a rule sufficient).

(*n*) Gaunt *v.* Fynney (1872) 8 Ch. 8 (case of nuisance from noise broke down, slight obstruction to ancient light held no ground for injunction).

(*o*) See the cases reviewed by Pearson J., Fletcher *v.* Bealey (1885) 28 Ch. D. 688.

(*p*) 28 Ch. D. at p. 698. A premature action of this kind may be dismissed without prejudice to future proceedings in the event of actual nuisance or imminent danger: *ib.* 704.

determining whether the injury is serious within the [* 346] meaning of the rule on which * the Court acts (*q*). But there must be substantial injury in view to begin with. The following passages from a judgment of the late Lord Justice James will be found instructive on this point:—

"In this case the Master of the Rolls has dismissed with costs the bill of the plaintiff.

"The bill, in substance, sought by a mandatory injunction to prevent the defendants, who are a great colliery company, from erecting or working any coke ovens or other ovens to the nuisance of the plaintiff, the nuisance alleged being from smoke and deleterious vapours.

"The Master of the Rolls thought it right to lay down what he conceived to be the principle of law applicable to a case of this kind, which principle he found expressed in the case of St. Helen's Smelting Co. *v.* Tipping (*r*), in which Mr. Justice Mellor gave a very elaborate charge to the jury, which was afterwards the subject of a very elaborate discussion and consideration in the House of Lords. The Master of the Rolls derived from that case this principle; that in any case of this kind, where the plaintiff was seeking to interfere with a great work carried on, so far as the work itself is concerned, in the normal and useful manner, the plaintiff must show substantial, or, as the Master of the Rolls expressed it, 'visible' damage. The term 'visible' was very much quarrelled with before us, as not being accurate in point of law. It was stated that the word used in the judgment of the Lord Chancellor was 'sensible.' I do not think that there is much difference between the two expressions. When the Master of the Rolls said that the damage must be visible, it appears to me that he was quite right; and as I understand the proposition, it amounts to this, that, although [* 347] when you * once establish the fact of actual substantial damage, it is quite right and legitimate to have recourse to scientific evidence as to the causes of that damage, still, if you are obliged to start with scientific evidence, such as the microscope of the naturalist, or the tests of the chemist, for the purpose of establishing the damage itself, that evidence will not suffice. The damage must be such as can be shown by a plain witness to a plain common juryman.

(*q*) Goldsmid *v.* Tunbridge Wells Improvement Commrs. (1866) 1 Ch. 349, 354.

(*r*) 11 H. L. C. 642 (1865).

"The damage must also be substantial, and it must be, in my view, actual; that is to say, the Court has, in dealing with questions of this kind, no right to take into account contingent, prospective or remote damage. I would illustrate this by analogy. The law does not take notice of the imperceptible accretions to a river bank, or to the sea-shore, although after the lapse of years they become perfectly measureable and ascertainable; and if in the course of nature the thing itself is so imperceptible, so slow, and so gradual as to require a great lapse of time before the results are made palpable to the ordinary senses of mankind, the law disregards that kind of imperceptible operation. So, if it were made out that every minute a millionth of a grain of poison were absorbed by a tree, or a millionth of a grain of dust deposited upon a tree, that would not afford a ground for interfering, although after the lapse of a million minutes the grains of poison or the grains of dust could be easily detected.

"It would have been wrong, as it seems to me, for this Court in the reign of Henry VI. to have interfered with the further use of sea coal in London, because it had been ascertained to their satisfaction, or predicted to their satisfaction, that by the reign of Queen Victoria both white and red roses would have ceased to bloom in the Temple Gardens. If some picturesque haven opens its arms to invite the commerce of the world, it is * not for this Court to forbid the [* 348] embrace, although the fruit of it should be the sights, and sounds, and smells of a common seaport and shipbuilding town, which would drive the Dryads and their masters from their ancient solitudes.

"With respect to this particular property before us, I observe that the defendants have established themselves on a peninsula which extends far into the heart of the ornamental and picturesque grounds of the plaintiff. If, instead of erecting coke ovens at that spot, they had been minded, as apparently some persons in the neighbourhood on the other side have done, to import ironstone, and to erect smelting furnaces, forges, and mills, and had filled the whole of the peninsula with a mining and manufacturing village, with beer-shops, and pig-styes, and dog-kennels, which would have utterly destroyed the beauty and the amenity of the plaintiff's ground, this Court could not, in my judgment, have interfered. A man to whom Providence has given an estate, under which there are veins of coal worth perhaps hundreds of thousands of pounds per

acre, must take the gift with the consequences and concomitants of the mineral wealth in which he is a participant" (*s*).

It is not a necessary condition of obtaining an injunction to show material specific damage. Continuous interference with a legal right in a manner capable of producing material damage is enough (*t*).

Difficulty or expense of abatement no answer.

The difficulty or expense which the party liable for a nuisance may have to incur in removing it makes no difference to his liability, any more than a debtor's being [* 349] * unable to pay makes default in payment the less a breach of contract. And this principle applies not only to the right in itself, but to the remedy by injunction. The Court will use a discretion in granting reasonable time for the execution of its orders, or extending that time afterwards on cause shown. But where an injunction is the only adequate remedy for the plaintiff, the trouble and expense to which the defendant may be put in obeying the order of the Court are in themselves no reason for withholding it (*u*).

Parties entitled to sue for nuisance.

As to the person entitled to sue for a nuisance: as regards interference with the actual enjoyment of property, only the tenant in possession can sue; but the landlord or reversioner can sue if the injury is of such a nature as to affect his estate, say by permanent depreciation of the property, or by setting up an adverse claim of right (*x*). A lessee who has underlet cannot sue alone in respect of a temporary nuisance, though he may properly sue as co-plaintiff with the actual occupier (*y*). A nuisance caused by the improper use of a highway, such as keeping carts and vans standing an unreasonable time, is not one for which a reversioner can sue; for he suffers no present damage, and inasmuch as no length of time will justify a public nuisance, he is in no danger of an adverse right being established (*z*).

The reversioner cannot sue in respect of a nuisance

(*s*) James L. J., Salvin *v.* North Braneepeth Coal Co. (1874) 9 Ch. 705, at p. 708.

(*t*) Clowes *v.* Staffordshire Potteries Waterworks Co. (1872) 8 Ch. 125, 142; ep. Pennington *v.* Brinsop Hall Coal Co. (1877) 5 Ch. D. 769.

(*u*) A.-G. *v.* Colney Hatch Lunatic Asylum (1868) 4 Ch. 146.

(*x*) See Dicey on Parties, 340.

(*y*) Jones *v.* Chappell (1875) 20 Eq. 539, which also discredits the supposition that a weekly tenant cannot sue.

(*z*) Mott *v.* Shoolbred (1875) 20 Eq. 22.

in its nature temporary, such as noise and smoke, even if the nuisance drives away his tenants (*a*), or by reason thereof * he can get only a reduced rent [* 350] on the renewal of the tenancy (*b*). "Since, in order to give a reversioner an action of this kind, there must be some injury done to the inheritance, the necessity is involved of the injury being of a permanent character" (*c*). But as a matter of pleading it is sufficient for the reversioner to allege a state of things which is capable of being permanently injurious (*d*).

Parties liable.

As to liability: The person primarily liable for a nuisance is he who actually creates it, whether on his own land or not (*e*). The owner or occupier of land on which a nuisance is created, though not by himself or by his servants, may also be liable in certain conditions. If a man lets a house or land with a nuisance on it, he as well as the lessee is answerable for the continuance thereof (*f*), if it is caused by the omission of repairs which as between himself and the tenant he is bound to do (*f*), but not otherwise (*g*). If the landlord has not agreed to repair, he is not liable for defects of repair happening during the tenancy, even if he habitually looks to the repairs in * fact (*h*). It [* 351] seems the better opinion that where the tenant is bound to repair, the lessor's knowledge, at the time of letting, of the state of the property demised makes no difference, and that only something amounting to an authority to continue the nuisance will make him liable (*i*).

(*a*) Simpson *v.* Savage (1856) 1 C. B. N. S. 347; 26 L. J. C. P. 50.

(*b*) Mumford *v.* Oxford, &c. R. Co. (1856) 1 H. & N. 34; 25 L. J. Ex. 265.

(*c*) Per Cur. 1 C. B. N. S. at p. 361.

(*d*) Metropolitan Association *v.* Petch (1858) 5 C. B. N. S. 504; 27 L. J. C. P. 330.

(*e*) See Thompson *v.* Gibson (1841) 7 M. & W. 456.

(*f*) Todd *v.* Flight (1860) 9 C. B. N. S. 377; 30 L. J. C. P. 21. The extension of this in Gandy *v.* Jubber (1864) 5 B. & S. 78; 33 L. J. Q. B. 151, by treating the landlord's passive continuance of a yearly tenancy as equivalent to a re-letting, so as to make him liable for a nuisance created since the original demise, is inconsistent with the later authorities cited below: and in that case a judgment reversing the decision was actually prepared for delivery in the Ex. Ch., but the plaintiff meanwhile agreed to a *stet processus* on the recommendation of the Court: see 5 B. & S. 485, and the text of the undelivered judgment in 9 B. & S. 15.

(*g*) Pretty *v.* Bickmore (1873) L. R. 8 C. P. 401; Gwinnell *v.* Eamer (1875) L. R. 10 C. P. 658.

(*h*) Nelson *v.* Liverpool Brewery Co. (1877) 2 C. P. D. 311; cp. Rich *v.* Basterfield (1847) 4 C. B. 783; 16 L. J. C. P. 273.

(*i*) Pretty *v.* Bickmore (1873) L. R. 8 C. P. 401; Gwinnell *v.* Eamer (1875) L. R. 10 C. P. 658.

Again an occupier who by licence (not parting with the possession) authorizes the doing on his land of something whereby a nuisance is created is liable (*k*). But a lessor is not liable merely because he has demised to a tenant something capable of being so used as to create a nuisance, and the tenant has so used it (*l*). Nor is an owner not in possession bound to take any active steps to remove a nuisance which has been created on his land without his authority and against his will (*m*).

If one who has erected a nuisance on his land conveys the land to a purchaser who continues the nuisance, the vendor remains liable (*n*), and the purchaser is also liable if on request he does not remove it (*o*).

(*k*) White *v.* Jameson (1874) 18 Eq. 303.

(*l*) Rich *v.* Basterfield (1847) 4 C. B. 783; 16 L. J. C. P. 273.

(*m*) Saxby *v.* Manchester & Sheffield R. Co. (1869) L. R. 4 C. P. 198, where the defendants had given the plaintiff licence to abate the nuisance himself as far as they were concerned.

(*n*) Rosewell *v.* Prior (1701) 12 Mod. 635.

(*o*) Penruddock's Ca. 5 Co. Rep. 101 *a*.

* CHAPTER XI. [* 352]

NEGLIGENCE.

I.—*The General Conception.*

Omission contrasted with action as ground of liability.

For acts and their results (within the limits expressed by the term "natural and probable consequences," and discussed in a foregoing chapter, and subject to the grounds of justification and excuse which have also been discussed) the actor is, generally speaking, held answerable by law. For mere omission a man is not, generally speaking, held answerable. Not that the consequences or the moral gravity of an omission are necessarily less. One who refrains from stirring to help another may be, according to the circumstances, a man of common though no more than common good will and courage, a fool, a churl, a coward, or little better than a murderer. But, unless he is under some specific duty of action, his omission will not in any case be either an offence or a civil wrong. The law does not and cannot undertake to make men render active service to their neighbours at all times when a good or a brave man would do so (*a*). Some already existing relation of duty must be established, which relation will be found in most cases, though not in all, to depend on a foregoing voluntary act of the party held liable. He was not in the first instance bound to do anything at all; but * by some independent motion of his own he [* 353] has given hostages, so to speak, to the law. Thus I am not compelled to be a parent; but if I am one, I must maintain my children. I am not compelled to employ servants; but if I do, I must answer for their conduct in the course of their employment. The widest rule of this kind is that which is developed in the law of Negligence. One who enters on the doing of anything attended with risk to the persons or property of others is held answerable for the use of a certain measure of

(*a*) See Note M to the Indian Penal Code as originally framed by the Commissioners.

caution to guard against that risk. To name one of the commonest applications, "those who go personally or bring property where they know that they or it may come in collision with the persons or property of others have by law a duty cast upon them to use reasonable care and skill to avoid such a collision" (*b*). The caution that is required is in proportion to the magnitude and the apparent imminence of the risk: and we shall see that for certain cases the policy of the law has been to lay down exceptionally strict and definite rules. While some acts and occupations are more obviously dangerous than others, there is hardly any kind of human action that may not, under some circumstances, be a source of some danger. Thus we arrive at the general rule that every one is bound to exercise due care towards his neighbours in his acts and conduct, or rather omits or falls short of it at his peril; the peril, namely, of being liable to make good whatever harm may be a proved consequence of the default (*c*).

General duty of caution in acts.

In some cases this ground of liability may co-exist with a liability on contract towards the same person, and arising (as regards the breach) out of the same [* 354] facts. Where a * man interferes gratuitously, he is bound to act in a reasonable and prudent manner according to the circumstances and opportunities of the case. And this duty is not affected by the fact, if so it be, that he is acting for reward, in other words, under a contract, and may be liable on the contract (*d*). The two duties are distinct, except so far as the same party cannot be compensated twice over for the same facts, once for the breach of contract and again for the wrong. Historically the liability in tort is older; and indeed it was by a special development of this view that the action of assumpsit, afterwards the common mode of enforcing simple contracts, was brought into use (*e*). "If a

Overlapping of contract and tort.

(*b*) Lord Blackburn, 3 App. Ca. at p. 1206.

(*c*) Cp. per Brett M. R., Heaven *v.* Pender (1883), 11 Q. B. Div. at p. 507.

(*d*) This appears to be the substance of the rule intended to be laid down by Brett M. R. in Heaven *v.* Pender (1883) 11 Q. B. D. at pp. 507–510; his judgment was however understood by the other members of the Court (Cotton and Bowen L. JJ.) as formulating some wider rule to which they could not assent. The case itself comes under the special rules defining the duty of occupiers (see Chap. XII. below). And, so far as the judgment of Brett M. R. purported to exhibit those rules as a simple deduction from the general rule as to negligence, it is submitted that the dissent of the Lords Justices was well founded.

(*e*) Cp. the present writer's "Principles of Contract," p. 142, 4th ed.

smith prick my horse with a nail, &c, I shall have my action upon the case against him, *without any warranty by the smith to do it well.* . . . For it is the duty of every artificer to exercise his art rightly and truly as he ought" (*f*). This overlapping of the regions of Contract and Tort gives rise to troublesome questions which we are not yet ready to discuss. They are dealt with in the concluding chapter of this book. Meanwhile we shall have to use for authority and illustration many cases where there was a co-existing duty *ex contractu*, or even where the duty actually enforced was of that kind. For the obligation of many contracts is, by usage and the nature of the case, * not to perform [* 355] something absolutely, but to use all reasonable skill and care to perform it. Putting aside the responsibilities of common carriers and innkeepers, which are peculiar, we have this state of things in most agreements for custody or conveyance, a railway company's contract with a passenger for one. In such cases a total refusal or failure to perform the contract is rare. The kind of breach commonly complained of is want of due care in the course of performance. Now the same facts may admit of being also regarded as a wrong apart from the contract, or they may not. But in either case the questions, what was the measure of due care as between the defendant and the plaintiff, and whether such care was used, have to be dealt with on the same principles. In other words, negligence in performing a contract and negligence independent of contract create liability in different ways: but the authorities that determine for us what is meant by negligence are in the main applicable to both.

Definition of negligence.

The general rule was thus stated by Baron Alderson: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do" (*g*): provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care. This, it will be observed, says nothing of the party's state of mind, and rightly. Jurisprudence is not psychology, and law disregards many psychological dis-

(*f*) F. N. B. 94 D.

(*g*) Blyth *v.* Birmingham Waterworks Co. (1856) 11 Ex. at p. 784; 25 L. J. Ex. at p. 213; adopted by Brett J. in Smith *v.* L. & S. W. R. Co. (1870) L. R. 5 C. P. at p. 102.

tinctions not because lawyers are ignorant of their ex- [* 356] istence, but because for legal * purposes it is impracticable or useless to regard them. Even if the terms were used by lawyers in a peculiar sense, there would be no need for apology, but the legal sense is the natural one. Negligence is the contrary of diligence, and no one describes diligence as a state of mind. The question for judges and juries is not what a man was thinking or not thinking about, expecting or not expecting, but whether his behaviour was or was not such as we demand of a prudent man under the given circumstances. Facts which were known to him, or by the use of appropriate diligence would have been known to a prudent man in his place, come into account as part of the circumstances. Even as to these the point of actual knowledge is a subordinate one as regards the theoretical foundation of liability. The question is not so much what a man of whom diligence was required actually thought of or perceived, as what would have been perceived by a man of ordinary sense who did think (*h*). A man's responsibility may be increased by his happening to be in possession of some material information beyond what he might be expected to have. But this is a rare case.

As matter of evidence and practice, proof of actual knowledge may be of great importance. If danger of a well understood kind has in fact been expressly brought to the defendant's notice as the result of his conduct, and the express warning has been disregarded or rejected (*i*), it is both easier and more convincing to prove this than to show in a general way what a prudent man in the defendant's place ought to have known. In an extreme case reckless omission to use care, after [* 357] notice of the risk, may * be held, as matter of fact, to prove a mischievous intention: or, in the terms of Roman law, *culpa lata* may be equivalent to *dolus*. For purposes of civil liability it is seldom (if ever) necessary to decide this point.

The standard of duty does not vary with individual ability.

We have assumed that the standard of duty is not the foresight and caution which this or that particular man is capable of, but the foresight and caution of a prudent man—the average prudent man, or, as our books rather affect to say, a reasonable man—standing

(*h*) Brett M. R., 11 Q. B. Div. 508.

(*i*) As in Vaughan *v.* Menlove (1837) 3 Bing. N. C. 468, where the defendant, after being warned that his haystack was likely to take fire, said he would chance it (pp. 471, 477.)

in this or that man's shoes (*k*). This idea so pervades the mass of our authorities that it can be appreciated only by some familiarity with them. In the year 1837 it was formally and decisively enounced by the Court of Common Pleas (*l*). The action was against an occupier who had built a rick of hay on the verge of his own land, in such a state that there was evident danger of fire, and left it there after repeated warning. The hayrick did heat, broke into flame, and set fire to buildings which in turn communicated the fire to the plaintiff's cottages, and the cottages were destroyed. At the trial the jury were directed "that the question for them to consider was whether the fire had been occasioned by gross negligence on the part of the defendant," and "that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances." A rule for a new trial was obtained "on the ground that the jury should have been directed to consider, not whether the defendant had been guilty of gross negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion; but whether he had acted *bona fide* to the * best of his judgment; if he [* 358] had, he ought not to be responsible for the misfortune of not possessing the highest (*m*) order of intelligence." The Court unanimously declined to accede to this view. They declared that the care of a prudent man was the accustomed and the proper measure of duty. It had always been so laid down, and the alleged uncertainty of the rule had been found no obstacle to its application by juries. It is not for the Court to define a prudent man, but for the jury to say whether the defendant behaved like one. "Instead of saying that the liability for negligence should be co-extensive with the judgment of each individual—which would be as variable as the length of the foot of each individual —we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe" (*n*). Quite lately the same principle has been enforced in the Supreme Court of Massachusetts. "If a man's conduct is such

(*k*) Compare the Aristotelian ὁ *Φρόνιμος* or ὁ *σπουδαῖος* in determining the standard of moral duty.

(*l*) Vaughan *v.* Menlove (1837) 3 Bing. N. C. 468.

(*m*) This misrepresents the rule of law: not the highest intelligence, but intelligence not below the average prudent man's, being required.

(*n*) Tindal C. J., 3 Bing. N. C. at p. 475.

as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he can bring himself within some broadly defined exception to general rules, the law deliberately leaves his personal equation or idiosyncracies out of account, and peremptorily assumes that he has as much capacity to judge and to foresee consequences as a man of ordinary prudence would have in the same situation" (*o*)

Diligence includes competence.

It will be remembered that the general duty of diligence includes the particular duty of competence in cases where the matter taken in hand is of a sort re- [* 359] quiring more than * the knowledge or ability which any prudent man may be expected to have. The test is whether the defendant has done "all that any skilful person could reasonably be required to do in such a case" (*p*). This is not an exception or extension, but a necessary application of the general rule. For a reasonable man will know the bounds of his competence, and will not intermeddle (save in extraordinary emergency) where he is not competent (*q*).

II.—*Evidence of Negligence.*

Negligence a question of mixed fact and law.

Due care and caution, as we have seen, is the diligence of a reasonable man, and includes reasonable competence in cases where special competence is needful to ensure safety. Whether due care and caution have been used in a given case is, by the nature of things, a question of fact. But it is not a pure question of fact in the sense of being open as a matter of course and without limit. Not every one who suffers harm which he thinks can be set down to his neighbour's default is thereby entitled to the chance of a jury giving him damages. The field of inquiry has limits defined, or capable of definition, by legal principle and judicial discussion. Before the Court or the jury can proceed to pass upon the facts alleged by the plaintiff, the Court must be satisfied that those facts, if proved, are in law capable of supporting the inference that the defendant has failed in what the law requires at his hands. In the current forensic phrase, there must be evidence of negligence. The peculiar relation

(*o*) Commonwealth *v.* Pierce (1884) 138 Mass. 165; 52 Am. Rep. 264; per Holmes J. See too per Bayley J. in Jones *v.* Bird (1822) 5 B. & A. at pp. 845–6.

(*p*) Bayley J., 5 B. & A. at p. 846.

(*q*) See p. 25, above.

of the judge to the jury in our common law system has given occasion for frequent and minute discussion on the propriety of leaving or not leaving for the decision of the jury the facts alleged by a plaintiff as proof of negligence. Such discussions are not * car- [* 360] ried on in the manner best fitted to promote the clear statement of principles; it is difficult to sum up their results, and not always easy to reconcile them.

The tendency of modern rulings of Courts of Appeal has been, if not to enlarge the province of the jury, to arrest the process of curtailing it. Some distinct boundaries, however, are established.

Burden of proof.

Where there is no contract between the parties, the burden of proof is on him who complains of negligence. He must not only show that he suffered harm in such a manner that it might be caused by the defendant's negligence; he must show that it was so caused, and to do this he must prove facts inconsistent with due diligence on the part of the defendant. "Where the evidence given is equally consistent with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury" (*r*).

Nothing can be inferred, for example, from the bare fact that a foot-passenger is knocked down by a carriage in a place where they have an equal right to be, or by a train at a level crossing. Those who pass and repass in frequented roads are bound to use due care, be it on foot or on horseback, or with carriages: and before one can complain of another, he must show wherein care was wanting. "When the balance is even as to which party is in fault, the one who relies upon the negligence of the other is bound to turn the scale" (*s*). If the carriage was being driven furiously, or on the wrong side of the road, that is another matter. But the addition of an ambiguous circumstance will not do.

* Thus in Cotton *v.* Wood (*t*) the plaintiff's [* 361] wife having safely crossed in front of an omnibus, was startled by some other carriage, and ran back; the driver had seen her pass, and then turned round to speak to the conductor, so that he did not see her return in time to pull up and avoid mischief. The omnibus was on its

(*r*) Williams J. in Hammack *v.* White (1862) 11 C. B. N. S. 588; Cotton *v.* Wood (1860) 8 C. B. N. S. 568; 29 L. J. C. P. 333; Wakelin *v.* L. & S. W. R. Co. in H. L. Dec. 10, 1886.

(*s*) Erle C. J., Cotton *v.* Wood, *supra.*

(*t*) See note (*r*), above.

right side and going at a moderate pace. Here there was no evidence of negligence on the part of the defendant, the owner of the omnibus (*u*). His servants, on the plaintiff's own showing, had not done anything inconsistent with due care. There was no proof that the driver turned round to speak to the conductor otherwise than for a lawful or necessary purpose, or had any reason to apprehend that somebody would run under the horses' feet at that particular moment. Again if a horse being ridden (*v*) or driven (*x*) in an ordinary manner runs away without apparent cause, and in spite of the rider's or driver's efforts trespasses on the footway and there does damage, this is not evidence of negligence. The plaintiff ought to show positive want of care, or want of skill, or that the owner or person in charge of the horse knew it to be unmanageable. "To hold that the mere fact of a horse bolting is *per se* evidence of negligence would be mere reckless guesswork" (*y*).

Sometimes it is said that the burden of proof is on the plaintiff to show that he was himself using due care, and it has been attempted to make this supposed principle a guide to the result to be arrived at in cases [* 362] where the * defence of contributory negligence is set up (*z*). We do not think this view tenable on the recent English authorities. What we consider to be the true view of contributory negligence will be presently explained.

Where there is contract or undertaking.

The general principle has to be modified where there is a relation of contract between the parties, and (it should seem) when there is a personal undertaking without a contract. A coach runs against a cart; the cart is damaged, the coach is upset, and a passenger in the coach is hurt. The owner of the cart must prove that the driver of the coach was in fault. But the passenger in the coach can say to the owner: "You promised for gain and reward to bring me safely to my journey's end, so far as reasonable care and skill could

(*u*) It would be convenient if one could in these running-down cases on land personify the vehicle, like a ship.

(*v*) Hammack *v.* White (1862) 11 C. B. N. S. 588.

(*x*) Manzoni *v.* Douglas (1880) 6 Q. B. D. 145, where it was unsuccessfully attempted to shake the authority of Hammack *v.* White. The cases relied on for that purpose belong to a special class.

(*y*) Lindley J., 6 Q. B. D. at p. 153.

(*z*) *E. g.* Murphy *v.* Deane, 101 Mass. 455. *Contra* Lord Watson in Wakelin *v.* L. & S. W. R. Co. (H. L. Dec. 10, 1886).

attain it. Here am I thrown out on the road with a broken head. Your contract is not performed; it is for you to show that the misadventure is due to a cause for which you are not answerable" (*a*).

When a railway train runs off the line, or runs into another train, both permanent way and carriages, or both trains (as the case may be) being under the same company's control, these facts, if unexplained, are as between the company and a passenger evidence of negligence (*b*).

In like manner if a man has undertaken, whether for reward or not, to do something requiring special skill, he may fairly be called on, if things go wrong, to prove his competence: though if he is a competent man, the mere fact of a mishap (being of a kind that even a competent person is exposed to) would of itself be no evidence of * negligence. We shall see later that, [* 363] where special duties of safe keeping or repair are imposed by the policy of the law, the fact of an accident happening is held, in the same manner, to cast the burden of proving diligence on the person who is answerable for it, or in other words raises a presumption of negligence. This is said without prejudice to the yet stricter rule of liability that holds in certain cases.

Things within defendant's control.

Again there is a presumption of negligence when the cause of the mischief was apparently under the control of the defendant or his servants. The rule was declared by the Exchequer Chamber in 1865 (*c*), in these terms:—

"There must be reasonable evidence of negligence.

"But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

Therefore if I am lawfully and as of right (*d*) pass-

(*a*) In other words (to anticipate part of a special discussion) the obligation does not become greater if we regard the liability as *ex delicto* instead of *ex contractu;* but neither does it become less.

(*b*) Carpue *v.* London & Brighton R. Co. (1844) 5 Q. B. 747, 751; Skinner *v.* L. B. & S. C. R. Co. (1850) 5 Ex. 787.

(*c*) Scott *v.* London Dock Co. 3 H. & C. 596; 34 L. J. Ex. 220.

(*d*) That is, not merely by the defendant's licence, as will be explained later.

ing in a place where people are handling heavy goods, and goods being lowered by a crane fall upon me and knock me down, this is evidence of negligence against the employer of the men who were working the crane (*e*).

Common course of affairs judicially noticed.

The Court will take judicial notice of what happens in the ordinary course of things, at all events to the extent of using their knowledge of the common affairs [* 364] of life * to complete or correct what is stated by witnesses. Judges do not affect, for example, to be ignorant that the slipping of one passenger out of several thousand in hurrying up the stairs of a railway station is not an event so much out of the run of pure accidents as to throw suspicion on the safety of the staircase (*f*).

On evidence sufficient in law, question is for jury.

When we have once got something more than an ambiguously balanced state of facts; when the evidence, if believed, is less consistent with diligence than with negligence on the defendant's part, or shows the non-performance of a specific positive duty laid on him by statute, contract, or otherwise ; then the judgment whether the plaintiff has suffered by the defendant's negligence is a judgment of fact, and on a trial by jury must be left as such in the hands of the jury (*g*). It is true that the rules as to remoteness of damage set some bounds to the connexion of the defendant's negligence with the plaiutiff's loss (*h*). But even in this respect considerable latitude has been allowed (*i*). Railway accidents have for the last thirty years or more been the most frequent occasions of defining, or attempting to define, the frontier between the province of the jury and that of the Court.

Recent railway cases on level crossings and "invitation to alight."

Two considerable and well marked groups of cases stand out from the rest. One set may be broadly described as level crossing cases, and culminated in North-Eastern Railway Company *v.* Wanless, decided by the

(*e*) *Ib.* Crompton, Byles, Blackburn, Keating JJ., *diss.* Erle C. J. and Meller J.; but no dissenting judgment was delivered, nor does the precise ground of dissent appear.

(*f*) Crafter *v.* Metrop. R. Co. (1866) L. R. 1 C. P. 300.

(*g*) This is well put in the judgment in M'Cully *v.* Clark (Pennsylvania, 1861) Bigelow L. C. 559.

(*h*) Metrop. R. Co. *v.* Jackson (1877) 3 App. Ca. 193.

(*i*) See Williams *v.* G. W. R. Co. (1874) L. R. 9 Ex. 157, *supra*, p. 38.

House of Lords in 1874 (*k*); the other may still more roughly * (but in a manner which readers [* 365] familiar with the reports will at once understand) be called "invitation to alight" cases. These are now governed by Bridges *v.* North London Railway Company (*l*), another decision of the House of Lords which followed closely on Wanless's case. In neither of these cases did the House of Lords intend to lay down any new rule, nor any exceptional rule as regards railway companies: yet it was found needful a few years later to restate the general principle which had been supposed to be impugned. This was done in Metropolitan Railway Company *v.* Jackson (*m*).

Explanation in Metr. R. Co. *v.* Jackson.

"The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever (*n*).

"On a trial by jury it is, I conceive, undoubted that the facts are for the jury, and the law for the judge. It is * not, however, in many cases practicable com- [* 366] pletely to sever the law from the facts.

"But I think it has always been considered a question of law to be determined by the judge, subject, of course, to review, whether there is evidence which, if it is believed, and the counter evidence, if any, not believed, would establish the facts in controversy. It is for the jury to say whether, and how far, the evidence is to be believed. And if the facts as to which evidence is

(*k*) L. R. 7 H. L. 12.
(*l*) L. R. 7 H. L. 213 (1873–4).
(*m*) 3 App. Ca. 193 (1877).
(*n*) Lord Cairns, at p. 197.

given are such that from them a farther inference of fact may legitimately be drawn, it is for the jury to say whether that inference is to be drawn or not. But it is for the judge to determine, subject to review, as a matter of law, whether from those facts that farther inference may legitimately be drawn" (*o*).

The case itself was decided on the ground that the hurt suffered by the plaintiff was not the proximate consequence of any proved negligence of the defendants; not that there was no proof of the defendants having been negligent at all, for there was evidence which, if believed, showed mismanagement, and would have been quite enough to fix on the defendant company liability to make good any damage distinctly attributable to such mismanagement as its "natural and probable" consequence (*p*). As between the plaintiff and the defendant, however, evidence of negligence which cannot be reasonably deemed the cause of his injury is plainly the same thing as a total want of evidence. Any one can see that a man whose complaint is that his thumb was crushed in the door of a railway carriage would waste his trouble in proving (for example) that the train had not a head-light. The House [* 367] * of Lords determined, after no small difference of learned opinions below, that it availed him nothing to prove overcrowding and scrambling for seats. The irrelevance is more obvious in the one case than in the other, but it is only a matter of degree.

The "level crossing" type of cases.

In the "level crossing" group of cases we have some one crossing a railway at a place made and provided by the company for that purpose, and where the company is under the statutory duty of observing certain precautions. The party assumes that the line is clear; his assumption is erroneous, and he is run down by a passing train. Here the company has not entered into any contract with him; and he must prove either that the company did something which would lead a reasonable man to assume that the line was clear for crossing (*q*), or that there was something in their arrangements which made it impracticable or unreasonably difficult to

(*o*) Lord Blackburn at p. 207. Cp. Ryder *v.* Wombwell (1868), in Ex. Ch., L. R. 4 Ex. 32, which Lord Blackburn goes on to cite with approval.

(*p*) See pp. 32, 36, above.

(*q*) As in Wanless's case, L. R. 7 H. L. 12, where the gates (intended primarily for the protection of carriage traffic) were left open when they ought not to have been, so that the plaintiff was thrown off his guard.

ascertain whether the line was clear or not. What may reasonably be held to amount to such proof cannot be laid down in general terms. "You must look at each case, and all the facts of the case, before you make up your mind what the railway company ought to do" (*r*). But unless the plaintiff's own evidence shows that the accident was due to his own want of ordinary care (as where in broad daylight he did not look out at all) (*s*), the tendency of modern authority is to leave the matter very much at large for the jury. In Dublin, * Wicklow and Wexford Railway Co. *v.* Slat- [* 368] tery (*t*), the only point of negligence made against the railway company was that the train which ran over and killed the plaintiff's husband did not whistle before running through the station where he was crossing the line. It was night at the time, but not a thick night. Ten witnesses distinctly and positively testified that the engine did whistle. Three swore that they did not hear it. A jury having found for the plaintiff, it was held by the majority of the House of Lords that the Court could not enter a verdict for the defendant's, although they did not conceal their opinion that the actual verdict was a perverse one (*u*).

The "invitation to alight" group.

In the other group, which we have called "invitation to alight" cases, the nature of the facts is, if anything, less favourable to the defendant. A train stopping at a station overshoots the platform so that the front carriages stop at a place more or less inconvenient, or it may be dangerous, for persons of ordinary bodily ability to alight. A passenger bound for that station, or otherwise minded to alight, is unaware (as by reason of darkness or the like, he well may be) of

---

(*r*) Bowen L. J., Davey *v.* L. & S. W. R. Co. (1883), 12 Q. B. Div. at p. 76.

(*s*) Davey *v.* L. & S. W. R. Co. (1883) 12 Q. B. Div. 70: a case which perhaps belongs properly to the head of contributory negligence, of which more presently. Only the circumstance of daylight seems to distinguish this from Slattery's case (next note).

(*t*) 3 App. Ca. 1155. Nearly all the modern cases on "evidence of negligence" were cited in the argument (p. 1161). Observe that the question of the verdict being against the weight of evidence was not open (p. 1162).

(*u*) The majority consisted of Lord Cairns (who thought the verdict could not have stood if the accident had happened by daylight), Lord Penzance, Lord O'Hagen, Lord Selborne, and Lord Gordon; the minority of Lord Hatherley, Lord Coleridge, and Lord Blackburn. Ellis *v.* G. W. R. Co. (Ex. Ch. 1874) L. R. 9 C. P. 551, does not seem consistent with this decision; there was difference of opinion in that case also.

the inconvenience of the place (*x*), or else is aware of it, but takes the attendant risk rather than be carried beyond his destination. In either case he gets out as best he can, and, whether through false security, or [* 369] * in spite of such caution as he can use, has a fall or is otherwise hurt. Here the passenger is entitled by his contract with the company to reasonable accommodation, and they ought to give him facilities for alighting in a reasonably convenient manner. Overshooting the platform is not of itself negligence, for that can be set right by backing the train (*y*). It is a question of fact whether under the particular circumstances the company's servants were reasonably diligent for the accommodation of the passengers (*z*), and whether the passenger, if he alighted knowing the nature of the place, did so under a reasonable apprehension that he must alight there or not at all (*a*).

Complications with contributory negligence, &c.

All these cases are apt to be complicated with issues of contributory negligence and other similar though not identical questions. We shall advert to these presently. It will be convenient now to take a case outside these particular types, and free from their complications, in which the difficulty of deciding what is "evidence of negligence" is illustrated. Such an one is Smith *v.* London and South Western Railway Company (*b*).

Other illustrations of "evidence of negligence": Smith *v.* L. & S. W. R. Co.

The facts are, in this country and climate, of an exceptional kind: but the case is interesting because, though distinctly within the line at which the freedom of the jury ceases, that line is shown by the tone and language of the judgments in both the Common Pleas and the Exchequer Chamber to be nearly approached. The action was in respect of property burnt by fire, commu- [* 370] nicated from sparks which had * escaped from the defendant company's locomotives. The material elements of fact were the following.

Hot dry weather had prevailed for some time, and at the time of the accident a strong S. E. wind was blowing.

About a fortnight earlier grass had been cut by the defendants' servants on the banks adjoining the line,

(*x*) Cockle *v.* S. E. R. Co. (1872) Ex. Ch., L. R. 7 C. P. 321.
(*y*) Siner *v.* G. W. R. Co. (1869) Ex. Ch. L. R. 4 Ex. 117.
(*z*) Bridges *v.* N. London R. Co. *supra.*
(*a*) Robson *v.* N. E. R. Co. 2 Q. B. Div. 85; Rose *v.* N. E. R. Co. 2 Ex. Div. 248 (both in 1876).
(*b*) L. R. 5 C. P. 98, in Ex. Ch. 6 C. P. 14 (1870). The accident took place in the extraordinarily warm and dry summer of 1868.

and boundary hedge trimmed, and the cuttings and trimmings had, on the morning of the fire (*c*), been raked into heaps and lay along the bank inside the hedge. These cuttings and trimmings were, by reason of the state of the weather, very dry and inflammable.

Next the hedge there was a stubble field; beyond that a road; on the other side of the road a cottage belonging to the plaintiff, 200 yards in all distant from the railway.

Two trains passed, and immediately or shortly afterwards the strip of grass between the railroad and the hedge was seen to be on fire. Notwithstanding all efforts made to subdue it, the fire burnt through the hedge, spread over the stubble field, crossed the road, and consumed the plaintiff's cottage.

There was no evidence that the railway engines were improperly constructed or worked with reference to the escape of sparks, and no direct evidence that the fire came from one of them.

The jury found for the plaintiff; and it was held (though with some difficulty) (*d*) that they were warranted in so finding on the ground that the defendants were negligent, having regard to the prevailing weather, in leaving the dry trimmings in such a place and for so long a time. * The risk, though unusual, [* 371] was apparent, and the company was bound to be careful in proportion. "The more likely the hedge was to take fire, the more incumbent it was upon the company to take care that no inflammable material remained near to it" (*e*). Thus there was evidence enough (though it seems only just enough) to be left for the jury to decide upon. Special danger was apparent, and it would have been easy to use appropriate caution. On the other hand the happening of an accident in extraordinary circumstances, from a cause not apparent, and in a manner that could not have been prevented by any ordinary measures of precaution, is not of itself any evidence of negligence (*f*). And a staircase which has been used by many thousand persons without accident cannot be pronounced dangerous and defective merely

(*c*) See statement of the facts in the report in Ex. Ch. L. R. 6 C. P. at p. 15.

(*d*) Brett J. dissented in the Common Pleas, and Blackburn J. expressed some doubt in the Ex. Ch. on the ground that the particular damage in question could not have reasonably been anticipated.

(*e*) Lush J. in Ex. Ch. L. R. 6 C. P. at p. 23.

(*f*) Blyth *v.* Birmingham Water-works Co. (1856) 11 Ex. 781; 25 L. J. Ex. 212, *supra*, p. 42.

because the plaintiff has slipped on it, and somebody can be found to suggest improvements (*g*).

No precise general rule can be given.

Illustrations might be largely multiplied, and may be found in abundance in Mr. Horace Smith's or Mr. Campbell's monograph, or by means of the citations and discussions in the leading cases themselves. Enough has been said to show that by the nature of the problem no general formula can be laid down except in some such purposely vague terms as were used in Scott *v.* London Dock Co. (*h*).

Due care varies as *apparent* risk: application of this to accidents through personal infirmity.

[* 372] * We have said that the amount of caution required of a citizen in his conduct is proportioned to the amount of apparent danger. In estimating the probability of danger to others, we are entitled to assume, in the absence of anything to show the contrary, that they have the full use of common faculties, and are capable of exercising ordinary caution. If a workman throws down a heavy object from a roof or scaffolding "in a country village, where few passengers are," he is free from criminal liability at all events, provided "he calls out to all people to have a care" (*i*). Now some passer-by may be deaf, and may suffer by not hearing the warning. That will be his misfortune, and may be unaccompanied by any imprudence on his part; but it cannot be set down to the fault of the workman. If the workman had no particular reason to suppose that the next passer by would be deaf, he was bound only to such caution as suffices for those who have ears to hear. The same rule must hold if a deaf man is run over for want of hearing a shout or a whistle (*k*), or a blind man for want of seeing a light, or if a colour-blind man, being unable to make out a red danger flag, gets in the line of fire of rifle or artillery practice; or if in any of these circumstances a child of tender years, or an idiot, suffers through mere ignorance of the

(*g*) Crafter *v.* Metrop. R. Co. (1868) L. R. 1 C. P. 300: the plaintiff slipped on the brass "nosing" of the steps (this being the material in common use, whereof the Court took judicial notice "with the common experience which every one has," per Willes J. at p. 303), and it was suggested that lead would have been a safer material.

(*h*) P. 363, above.

(*i*) Blackst. Comm. iv. 192. D. 9. 2, ad leg. Aquil. 31. In a civil action it would probably be left to the jury whether, on the whole, the work was being done with reasonable care.

(*k*) Cp. Skelton *v.* L. & N. W. R. Co. (1867) L. R. 2 C. P. 631, decided however on the ground that the accident was wholly due to the man's own want of care.

meaning which the warning sight or sound conveys to a grown man with his wits about him. And this is not because there is any fault in the person harmed, for there may well be no fault at all. Whatever we think, or a jury might think, of a * blind man walk- [* 373] ing alone, it can hardly be deemed inconsistent with common prudence for a deaf man to do so; and it is known that colour-blind people, and those with whom they live, often remain ignorant of their failing until it is disclosed by exact observation or by some accident. It is not that the law censures a deaf man for not hearing, or a colour-blind one for not perceiving a red flag. The normal measure of the caution required from a lawful man must be fixed with regard to other men's normal powers of taking care of themselves, and abnormal infirmity can make a difference only when it is shown that in the particular case it was apparent.

Distinction where the person acting has notice of special danger to an infirm or helpless person.

On the other hand it seems clear that greater care is required of us when it does appear that we are dealing with persons of less than ordinary faculty. Thus if a man driving sees that a blind man, an aged man, or a cripple is crossing the road ahead, he must govern his course and speed accordingly. He will not discharge himself, in the event of a mishap, merely by showing that a young and active man with good sight would have come to no harm. In like manner if one sees a child, or other person manifestly incapable of normal discretion, exposed to risk from one's action, it seems that proportionate care is required; and it further seems on principle immaterial that the child would not be there but for the carelessness of some parent or guardian or his servant. These propositions are not supported by any distinct authority in our law that I am aware of (*l*). But they seem to follow from admitted principles, and to throw some light on questions which arise under the head of contributory negligence.

* III.—*Contributory Negligence.* [* 374]

Actionable negligence must be proximate cause of harm: where

In order that a man's negligence may entitle another to a remedy against him, that other must have suffered harm whereof this negligence is the proximate cause. Now I may be negligent, and my negligence may be the occasion of some one suffering harm, and yet the proximate cause of the damage may be not my want of care

(*l*) In the United States there is some: see Wharton, §§ 307, 310; Cooley on Torts 683.

plaintiff's own negligence is proximate cause, no remedy.

but his own. Had I been careful to begin with, he would not have been in danger; but had he, being so put in danger, used reasonable care for his own safety or that of his property, the damage would still not have happened. Thus my original negligence is but the remote cause of the harm, and as things turn out the proximate cause is the sufferer's own fault, or rather (since a man is under no positive duty to be careful in his own interest) he cannot ascribe it to the fault of another. In a state of facts answering this general description the person harmed is by the rule of the common law not entitled to any remedy. He is said to be "guilty of contributory negligence;" a phrase well established in our forensic usage, though not free from objection. It rather suggests, as the ground of the doctrine, that a man who does not take ordinary care for his own safety is to be in a manner punished for his carelessness by disability to sue any one else whose carelessness was concerned in producing the damage. But this view is neither a reasonable one, nor supported by modern authority, and it is already distinctly rejected by writers of no small weight (*m*). And it stands ill with the common practice of our courts, founded on [* 375] constant * experience of the way in which this question presents itself in real life. "The received and usual way of directing a jury . . is to say that if the plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendant's negligence, he cannot recover" (*n*). That is to say, he is not to lose his remedy merely because he has been negligent at some stage of the business, though without that negligence the subsequent events might not or could not have happened; but only if he has been negligent in the final stage and at the decisive point of the event, so that the mischief, as and when it happens, is proximately due to his own want of care and not to the defendant's. Again the penal theory of contributory negligence fails to account for the accepted qualification of the rule, "namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence,

(*m*) See Campbell, 180; Horace Smith, 226; and Wharton, § 300 *sqq.* who gives the same conclusions in a more elaborate form. The use of such phrases as *in pari delicto* is confusing and objectionable.

(*n*) Lord Blackburn, 3 App. Ca. at p. 1207.

have avoided the mischief which happened, the plaintiff's negligence will not excuse him" (*o*).

Tuff *v.* Warman.

The leading case which settled the doctrine in its modern form is Tuff *v.* Warman (*p*). The action was against the pilot of a steamer in the Thames for running down the plaintiff's barge; the plaintiff's own evidence showed that there was no look-out on the barge; as to the conduct of the steamer the evidence was conflicting, but according to the plaintiff's witnesses, she might easily have cleared the barge. Willes J. left it to the jury to say whether the want of a look-out was negligence on * the part of the plaintiff, and [* 376] if so, whether it "directly contributed to the accident." This was objected to as too favourable to the plaintiff, but was upheld both in the full Court of Common Pleas and in the Exchequer Chamber. In the considered judgment on appeal (*q*) it is said that the proper question for the jury is "whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened." But negligence will not disentitle the plaintiff to recover, unless it be such that without it the harm complained of could not have happened; "nor if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff."

Radley *v.* L. & N. W. R. Co.

In Radley *v.* London and North Western Railway Co. (*r*), this doctrine received a striking confirmation. "A railway company was in the habit of taking full trucks from the siding of a colliery owner, and returning the empty trucks there. Over this siding was a bridge eight feet high from the ground. On a Saturday afternoon, when all the colliery men had left work, the servants of the railway ran some trucks on the siding.

(*o*) Lord Penzance, Radley *v.* L. & N. W. R. Co. (1876) 1 App. Ca. at p. 759.

(*p*) 2 C. B. N. S. 740; 5 C. B. N. S. 573; 27 L. J. C. P. 322 (1857-8).

(*q*) 5 C. B. N. S. at p. 585.

(*r*) 1 App. Ca. 754, reversing the judgment of the Exchequer Chamber, L. R. 10 Ex. 100, and restoring that of the Court of the Exchequer, L. R. 9 Ex. 71 (1874-5). The statement of the facts is from the head-note in 1 App. Ca.

All but one were empty, and that one contained another truck, and their joint height amounted to eleven feet. On the Sunday evening the railway servants brought on [* 377] the siding many * other empty trucks, and pushed forward all those previously left on the siding. Some resistance was felt, the power of the engine pushing the trucks was increased, and the two trucks, the joint height of which amounted to eleven feet, struck the bridge and broke it down. In an action to recover damages for the injury, the defence of contributory negligence was set up. The judge at the trial told the jury that the plaintiffs must satisfy them that the accident happened solely through the negligence of the defendants' servants, for that if both sides were negligent, so as to contribute to the accident, the plaintiffs could not recover."

On these facts and under this direction the jury found that there was contributory negligence on the part of the plaintiffs, and a verdict was entered for the defendants. The Court of Exchequer (*s*) held that there was no evidence of contributory negligence, chiefly on the ground that the plaintiffs were not bound to expect or provide against the negligence of the defendants. The Exchequer Chamber (*t*) held that there was evidence of the plaintiffs having omitted to use reasonable precaution, and that the direction given to the jury was sufficient. In the House of Lords it was held (*u*) that there was a question of fact for the jury, but the law had not been sufficiently stated to them. They had not been clearly informed, as they should have been, that not every negligence on the part of the plaintiff which in any degree contributes to the mischief will bar him of his remedy, but only such negligence that the defendant could not by the exercise of ordinary care have avoided the result.

[* 378] * "It is true that in part of his summing-up, the learned judge pointed attention to the conduct of the engine driver, in determining to force his way through the obstruction, as fit to be considered by the jury on the question of negligence; but he failed to add that if they thought the engine-driver might at this stage of the matter by ordinary care have avoided all

---

(*s*) Bramwell and Amphlett BB.

(*t*) Blackburn, Mellor, Lush, Grove, Brett, Archibald JJ.; diss. Denman J.

(*u*) By Lord Penzance, Lord Cairns, Lord Blackburn (thus retracting his opinion in the Ex. Ch.), and Lord Gordon.

accident, any previous negligence of the plaintiffs would not preclude them from recovering.

"In point of fact the evidence was strong to show that this was the immediate cause of the accident, and the jury might well think that ordinary care and diligence on the part of the engine-driver would, notwithstanding any previous negligence of the plaintiffs in leaving the loaded-up truck on the line, have made the accident impossible. The substantial defect of the learned judge's charge is that the question was never put to the jury" (*v*).

This leaves no doubt that the true ground of contributory negligence being a bar to recovery is that it is the proximate cause of the mischief; and negligence on the plaintiff's part which is only part of the inducing causes (*w*) will not disable him.

Earlier illustrations: Davies *v.* Mann.

Earlier cases are now material only as illustrations. A celebrated one is the "donkey case," Davies *v.* Mann (*x*). There the plaintiff had turned his ass loose in a highway with its forefeet fettered, and it was run over by the defendant's waggon, going at "a smartish pace." It was held a proper direction to the jury that, whatever they thought of the plaintiff's conduct, he was still entitled to his remedy if the accident might have been avoided by the * exercise of ordinary care on [* 379] the part of the driver. Otherwise "a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road" (*y*). With this may be compared the not much later case of Mayor of Colchester *v.* Brooke (*z*), where it was laid down (among many other matters) that if a ship runs on a bed of oysters in a river, and could with due care and skill have passed clear of them, the fact of the oyster-bed being a nuisance to the navigation does not afford an excuse.

Butterfield *v.* Forrester.

Butterfield *v.* Forrester (*a*) is a good example of obvious fault on both sides, where the plaintiff's damage was immediately due to his own want of care. The defendant had put up a pole across a public thoroughfare in Derby,

(*v*) Lord Penzance, 1 App. Ca. at p. 760.
(*w*) Or, as Mr. Wharton puts it, not a cause but a condition.
(*x*) 10 M. & W. 546; 12 L. J. Ex. 10 (1842).
(*y*) Parke B. 10 M. & W. at p. 549; cp. his judgment in Bridge *v.* Grand Junction R. Co. 3 M. & W. at p. 248.
(*z*) 7 Q. B. 339, 376.
(*a*) 11 East 60 (1809).

which he had no right to do. The plaintiff was riding that way at eight o'clock in the evening in August, when dusk was coming on, but the obstruction was still visible a hundred yards off: he was riding violently, came against the pole, and fell with his horse. It was left to the jury whether the plaintiff, riding with reasonable and ordinary care, could have seen and avoided the obstruction; if they thought he could, they were to find for the defendant; and they did so. The judge's direction was affirmed on motion for a new trial. "One person being in fault will not dispense with another's using ordinary care for himself."

Where defendant's negligence not proximate cause for other reasons.

The doctrine of contributory negligence has been seen to be a special application of the universal principle of [*380] * liability in tort for harm not purposely inflicted, that "the plaintiff has to show that the negligence" (or other wrongful act or default) "of the person whom he sues is the proximate cause of the accident" (*b*). In this particular class of cases "proximate cause" may not be the best possible term. Perhaps "decisive cause" or "decisive antecedent" would convey the meaning better; but since Radley's case and Tuff *v.* Warman (*c*), there can be no substantial doubt of what is meant. Another application remains which, by reason of the artificial language used in the authorities, has given rise to no small difficulty. The plaintiff may fail because it appears that the decisive cause of his damage was his own want of due care. On the same principal he may fail if the decisive cause was want of due care on the part of some other person indifferent to the defendant. As regards the defendant, the case is the same as if the accident had been altogether inevitable. It matters not, for the purpose of clearing me from liability, whether the mischief was one that no care of any one's could have prevented, or one that could, with due care, have been avoided at the decisive stage by some one, but not by me or by any one for whose care and skill I must answer, or whose want of care I could reasonably be expected to anticipate. Again, it matters not whether the person in default, if any, be the plaintiff himself or some other person, nor whether any such person is connected with the plaintiff by contract or any other per-

(*b*) Pollock B. in Armstrong *v.* L. & Y. R. Co. (1875) L. R. 10 Ex. at p. 53.

(*c*) 2 C. B. N. S. 740; 5 C. B. N. S. 573; 27 L. J. C. P. 322 (1857-8); *supra*, p. 375.

sonal duty, so long as he is (in the sense above mentioned) independent of me.

Collisions where both drivers, &c., negligent.

Hence if A. is riding in B.'s carriage driven by B.'s servant, and through a collision with C.'s carriage A. * takes hurt (*d*), the decision must in every [* 381] case depend on the question of fact to whose fault the harm was proximately due. If the negligence or wilful wrong of C.'s driver was the sole proximate cause, A.'s remedy will be against C. If B.'s driver was in fault so that his wrong and not that of C.'s driver was the proximate cause, A. may have a remedy against B., but has none against C. The same rule must hold if A. is travelling in a train belonging to one company on a line belonging to another company, and an accident happens which is due partly to negligence in the management of the line and partly to negligence in the management of the train (*e*). Not that we are entitled to assume that there is always only one proximate cause; there are cases in which two or more persons have so acted, though not in concert or simultaneously, as to be liable as joint wrong-doers. A. leaves a loaded gun in a place accessible to young persons; B. and C., two schoolboys, come there; B. takes up the gun, points it at C., and draws the trigger; the gun goes off and bursts, wounding both B. and C. Here B. cannot sue A., but, as regards C., A. and B. are joint wrong-doers (*f*). To this class of cases, and the difficulties connected with them, we shall return presently.

Accidents to children in custody of adult.

Again if A. is a child of tender years (or other person incapable of taking ordinary care of himself), but in the custody of M., an adult, and one or both of them suffer harm under circumstances tending to prove negligence on the part of Z., and also contributory negligence on the part of M. (*g*), Z. will not be liable to A. unless Z.'s * negligence was the proximate cause of [* 382] the mischief. Therefore if M. could, by such reasonable diligence as is commonly expected of persons having the care of young children, have avoided the consequences of Z.'s negligence, A. is not entitled to sue Z.: and this not because M.'s negligence is imputed by

(*d*) Thorogood *v.* Bryan (1849) 8 C. B. 115; 18 L. J. C. P. 336; Rigby *v.* Hewitt (1850) 5 Ex. 240; 19 L. J. C. P. 291.
(*e*) Armstrong *v.* L. & Y. R. Co. (1875) L. R. 10 Ex. 47.
(*f*) See Dixon *v.* Bell, 5 M. & S. 198.
(*g*) Waite *v.* N. E. R. Co. (1859) Ex. Ch. E. B. & E. 719; 27 L. J. Q. B. 417; 28 L. J. Q. B. 258.

a fiction of law to A., who by the hypothesis is incapable of either diligence or negligence, but because the needful foundation of liability is wanting, namely, that Z.'s negligence, and not something else for which Z. is not answerable and which Z. had no reason to anticipate, should be the proximate cause.

Children &c., unattended.

Now take the case of a child not old enough to use ordinary care for its own safety, which by the carelessness of the person in charge of it is allowed to go alone in a place where it is exposed to danger. If the child comes to harm, does the antecedent negligence of the custodian make any difference to the legal result? On principle surely not, unless a case can be conceived in which that negligence is the proximate cause. The defendant's duty can be measured by his notice of special risk and his means of avoiding it; there is no reason for making it vary with the diligence or negligence of a third person in giving occasion for the risk to exist. If the defendant is so negligent that an adult in the plaintiff's position could not have saved himself by reasonable care, he is liable. If he is aware of the plaintiff's helplessness, and fails to use such special precaution as is reasonably possible, then also, we submit, he is liable. If he did not know, and could not with ordinary diligence have known, the plaintiff to be incapable of taking care of himself (*h*), and has used such diligence as [* 383] would be sufficient towards an adult; or if, * being aware of the danger, he did use such additional caution as he reasonably could; or if the facts were such that no additional caution was practicable, and there is no evidence of negligence according to the ordinary standard (*i*), then the defendant is not liable.

No English decision has been met with that goes the length of depriving a child of redress on the ground that a third person negligently allowed it to go alone (*k*). In America there have been such decisions in Massachusetts (*l*), New York, and elsewhere: "but there

(*h*) This might happen in various ways, by reason of darkness or otherwise.

(*i*) Singleton *v.* E. C. R. Co. 7 C. B. N. S. 287, is a case of this kind, as it was decided not on the fiction of imputing a third person's negligence to a child, but on the ground (whether rightly taken or not) that there was no evidence of negligence at all.

(*k*) Mangan *v.* Atterton (1866) L. R. 1 Ex. 239, comes near it. But that case went partly on the ground of the damage being too remote, and since Clark *v.* Chambers (1878) 3 Q. B. D. 327, *supra*, p. 43, it is of doubtful authority. For our own part we think it is not law.

(*l*) Holmes, The Common Law, 128.

are as many decisons to the contrary" (*m*): and the supposed rule in Thorogood *v.* Bryan (*n*) has been explicity rejected by the Supreme Court of the United States (o).

Artificial language of the authorities: "identification."

The state of existing authorities is certainly not satisfactory. When the line of cases began with Thorogood *v.* Bryan (*n*), the doctrine of contributory negligence, as * settled some years later by Tuff *v.* War- [* 384] man (*p*), was still not fully understood. Hence the true principle was obscurely felt, and clothed in artificial and misleading forms of language. It was said that a person who rides as a paying passenger in an omnibus is in a manner "identified with the owner of the conveyance," so that "the negligence of the driver is as his own negligence in point of law" (*q*). Similarly the negligence of the person who has charge of a child is said to be equivalent to the negligence of the child itself; and learned judges have not even shrunk from the dialectic feat of identifying a child with its grandmother (*r*). In the latest common law case on the subject in this country the true principle is indicated but not made prominent (*s*). We believe, nevertheless, that it accounts for all the authorities we are bound to consider; we do not say reconciles, for the apparent conflicts are mostly if not wholly on inferences of fact.

(*m*) Biglow L. C. 729, and see Horace Smith 241. In Vermont (Robinson *v.* Cone, 22 Vt. 213, 224, *ap.* Cooley on Torts, 681) the view maintained in the text is distinctly taken. "We are satisfied that, although a child or idiot or lunatic may to some extent have escaped into the highway, through the fault or negligence of his keeper, and so be improperly there, yet if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one know that such a person is on the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be but ordinary neglect in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger." So, too, Bigelow 730.

(*n*) 8 C. B. 115; 18 L. J. C. P. 336 (1849).

(*o*) Little *v.* Hackett (1886) 14 Am. Law Rec. 578.

(*p*) *Supra* pp. 375, 380.

(*q*) Thorogood *v.* Bryan (1849) 8 C. B. 115; 18 L. J. C. P. 336. In Rigby *v.* Hewitt (1850) 5 Ex. 240; 19 L. J. Ex. 291, decided very soon afterwards, Thorogood *v.* Bryan was disregarded though not expressly disapproved of.

(*r*) Waite *v.* N. E. R. Co. (1859) Ex. Ch. 28 L. J. Q. B. at pp. 259, 260. But note that in this case there was a question of the extent of the company's duty under their contract with a passenger.

(*s*) Judgment of Pollock B. *ad fin.* Armstrong *v.* L. & Y. R. Co. (1875) L. R. 10 Ex. at p. 53.

See addenda page xxxii.

In one peculiar case (*t*) the doctrine of "identification" has been brought in, gratuitously as it would seem. The plaintiff was a platelayer working on a railway; the railway company was by statute bound to maintain a fence to prevent animals (*u*) from straying off the adjoining land; the defendant was an adjacent owner who kept pigs. The fence was insufficient to keep out [* 385] pigs (*v*). * Some pigs of the defendant's found their way on to the line, it did not appear how, and upset a trolly worked by hand on which the plaintiff and others were riding back from their work. The plaintiff's case appears to be bad on one or both of two grounds; there was no proof of actual negligence on the defendant's part, and even if his common-law duty to fence was not altogether superseded, as regards that boundary, by the Act casting the duty on the railway company, he was entitled to assume that the company would perform their duty; and also the damage was too remote (*x*). But the ground actually taken was that "the servant can be in no better position than the master when he is using the master's property for the master's purposes," or " the plaintiff is identified with the land which he was using for his own convenience;" *quod mirum.*

Sometimes it is said in general terms (apart from this question of so-called identification) that contributory negligence of a third person is no defence. How far this is a correct statement, we shall examine, among other miscellaneous points in the doctrine of negligence, at the end of the present chapter.

Admiralty rule of dividing loss.

The common law rule of contributory negligence is unknown to the maritime law administered in courts of Admiralty jurisdiction. Under a rough working rule commonly called *judicium rusticum*, and apparently derived from early medieval codes or customs, with none [* 386] of which, * however, it coincides in its modern application (*y*), the loss is equally divided in cases

(*t*) Child *v.* Hearn (1874) L. R. 9 Ex. 176.

(*u*) "Cattle," held by the Court to include pigs.

(*v*) That is, pigs of average vigour and obstinacy; see per Bramwell B., whose judgment (pp. 181, 182) is almost a caricature of the general idea of the "reasonable man." It was alleged, but not found as a fact, that the defendant had previously been warned by some one of his pigs being on the line.

(*x*) Note in Addison on Torts, 5th ed. 27.

(*y*) Marsden on Collisions at Sea, ch. 5 (2d ed.), and see an article by the same writer in L.Q. R. ii. 357.

See addenda page xxxii.

of collision where both ships are found to have been in fault. It seems more than doubtful whether the old maritime law made any distinction between cases of negligence and of pure accident. However that may be, the rule dates from a time when any more refined working out of principle was impossible (*z*). As a rule of thumb, which frankly renounces the pretence of being anything more, it is not amiss, and it appears to be generally accepted by those whom it concerns. By the Judicature Act, 1873 (*a*), it is expressly preserved in the Admiralty Division.

IV.—*Auxiliary Rules and Presumptions.*

Action under difficulty caused by another's negligence.

There are certain conditions under which the normal standard of a reasonable man's prudence is peculiarly difficult to apply, by reason of one party's choice of alternatives, or opportunities of judgment, being affected by the conduct of the other. Such difficulties occur mostly in questions of contributory negligence. In the first place, a man who by another's want of care finds himself in a position of imminent danger cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger. That which appears the best way to a court examining the matter afterwards at leisure and * with full knowledge is not necessarily ob- [* 387] vious even to a prudent and skilful man on a sudden alarm. Still less can the party whose fault brought on the risk be heard to complain of the other's error of judgment. This rule has been chiefly applied in maritime cases, where a ship placed in peril by another's improper navigation has at the last moment taken a wrong course (*b*): but there is authority for it elsewhere. A person who finds the gates of a level railway crossing open, and is thereby misled into thinking the line safe for crossing, is not bound to minute circumspection, and if he is run over by a train the company may be

(*z*) Writers on maritime law state the rule of the common law to be that when both ships are in fault neither can recover anything. This may have been practically so in the first half of the century, but it is neither a complete nor a correct version of the law laid down in Tuff *v.* Warman, 5 C. B. N. S. 573; 27 L. J. C. P. 322.

(*a*) S. 25, sub-s. 9. See however Marsden, p. 149.

(*b*) The Bywell Castle (1879) 4 P. Div. 219; and see other examples collected in Marsden on Collisions at Sea, ch. 5, 2nd ed.

liable to him although "he did not use his faculties so clearly as he might have done under other circumstances" (*c*).

No duty to anticipate negligence of others.

One might generalize the rule in some such form as this: not only a man cannot with impunity harm others by his negligence, but his negligence cannot put them in a worse position with regard to the estimation of default. You shall not drive a man into a situation where there is loss or risk every way, and then say that he suffered by his own imprudence. Neither shall you complain that he did not foresee and provide against your negligence. We are entitled to count on the ordinary prudence of our fellow-men until we have specific warning to the contrary. The driver of a carriage assumes that other vehicles will observe the rule of the road, the master of a vessel that other ships will obey the statutory and other rules of navigation and the like. And generally no man is bound (either for the establish- [* 388] ment of his own claims, or to avoid * claims of third persons against him) to use special precaution against merely possible want of care or skill on the part of others (*d*).

It is not, as a matter of law, negligent in a passenger on a railway to put his hand on the door or the window-rod, though it might occur to a very prudent man to try first whether it was properly fastened; for it is the company's business to have the door properly fastened (*e*). On the other hand if something goes wrong which does not cause any pressing danger or inconvenience, and the passenger comes to harm in endeavouring to set it right himself, he cannot hold the company liable (*f*).

Choice of risks under stress of another's negligence.

We have a somewhat different case when a person, having an apparent dilemma of evils or risk put before him by another's default, makes active choice between them. The principle applied is not dissimilar: it is not necessarily and of itself contributory negligence to

(*c*) N. E. R. Co. *v.* Wanless (1874) L. R. 7 H. L. at p. 16; cp. Slattery's ca. (1878) 3 App. Ca. at p. 1193.

(*d*) See Daniel *v.* Metrop. R. Co. (1871) L. R. 5 H. L. 45.

(*e*) Gee *v.* Metrop. R. Co. (1873) Ex. Ch. L. R. 8 Q. B. 161. There was some difference of opinion how far the question of contributory negligence in fact was fit to be put to the jury.

(*f*) This is the principle applied in Adams *v.* L. & Y. R. Co. (1869) L. R. 4 C. P. 739, though (it seems) not rightly in the particular case; see in Gee *v.* Metrop. R. Co., L. R. 8 Q. B. at pp. 161, 173, 176.

do something which, apart from the state of things due to the defendant's negligence, would be imprudent.

The earliest case where this point is distinctly raised and treated by a full court is Clayards *v.* Dethick (*g*). The * plaintiff was a cab-owner. The de- [* 389] fendants, for purpose of making a drain, had opened a trench along the passage which afforded the only outlet from the stables occupied by the plaintiff to the street. The opening was not fenced, and the earth and gravel excavated from the trench were thrown up in a bank on that side of it, where the free space was wider, thus increasing the obstruction. In this state of things the plaintiff attempted to get two of his horses out of the mews. One he succeeded in leading out over the gravel, by the advice of one of the defendants then present. With the other he failed, the rubbish giving way and letting the horse down into the trench. Neither defendant was present at that time (*h*). The jury were directed "that it could not be the plaintiff's duty to refrain altogether from coming out of the mews merely because the defendants had made the passage in some degree dangerous: that the defendants were not entitled to keep the occupiers of the mews in a state of siege till the passage was declared safe, first creating a nuisance and then excusing themselves by giving notice that there was some danger: though, if the plaintiff had persisted in running upon a great and obvious danger, his action could not be maintained." This direction was approved. Whether the plaintiff had suffered by the defendants' negligence, or by his own rash action, was a matter of fact and of degree properly left to the jury: "the whole question was whether the danger was so obvious that the plaintiff could not with common prudence make the attempt." The decision has been adversely criticized by Lord Bramwell, but principle and authority seem on the whole to support it (*i*). Clayards v. Dethick.

(*g*) 12 Q. B. 439 (1848). The rule was laid down by Lord Ellenborough at nisi prius as early as 1816: Jones *v.* Boyce, 1 Stark. 493, cited by Montague Smith J., L. R. 4 C. P. at p. 743. The plaintiff was an outside passenger on a coach, and jumped off to avoid what seemed an imminent upset; the coach was however not upset. It was left to the jury whether by the defendant's fault he "was placed in such a situation as to render what he did a prudent precaution for the purpose of self-preservation."

(*h*) Evidence was given by the defendants, but apparently not believed by the jury, that their men expressly warned the plaintiff against the course he took.

(*i*) See Appendix B to Smith on Negligence, 2d ed. I agree with Mr. Smith's observations *ad fin.*, p. 279.

[* 390] * One or two of the railway cases grouped for practical purposes under the catch-word "invitation to alight" have been decided, in part at least, on the principle that, where a passenger is under reasonable apprehension that if he does not alight at the place where he is (though an unsafe or unfit one) he will not have time to alight at all, he may be justified in taking the risk of alighting as best he can at that place (*k*); notwithstanding that he might, by declining that risk and letting himself be carried on to the next station, have entitled himself to recover damages for the loss of time and resulting expense (*l*).

Doctrine of New York courts.

There has been a line of cases of this class in the State of New York, where a view is taken less favourable to the plaintiff than the rule of Clayards *v.* Dethick. If a train fails to stop, and only slackens speed, at a station where it is timed to stop, and a passenger alights from it while in motion at the invitation of the company's servants (*m*), the matter is for the jury; so if a train does not stop a reasonable time for passengers to alight, and starts while one is alighting (*n*). Otherwise it is held that the passenger alights at his own risk. If he wants to hold the company liable he must go on to the next station and sue for the resulting damage (*o*).

On the other hand, where the defendant's negligence has put the plaintiff in a situation of imminent peril, the plaintiff may hold the defendant liable for the [* 391] natural * consequences of action taken on the first alarm, though such action may turn out to have been unnecessary (*p*). It is also held that the running of even an obvious and great risk in order to save human life may be justified, as against those by whose default that life is put in peril (*q*). And this seems just,

(*k*) Robson *v.* N. E. R. Co. (1875–6) L. R. 10 Q. B. 271, 274 (in 2 Q. B. Div. 85); Rose *v.* N. E. R. Co. (1876), 2 Ex. Div. 248.

(*l*) *Contra* Bramwell L. J. in Lax *v.* Corporation of Darlington (1879) 5 Ex. D. at p. 35; but the last-mentioned cases had not been cited.

(*m*) Filer *v.* N. Y. Central R. R. Co. (1872) 49 N. Y. (4 Sickels) 47.

(*n*) 63 N. Y. at p. 559.

(*o*) Burrows *v.* Erie R. Co. (1876) 63 N. Y. (18 Sickels) 556.

(*p*) Coulter *v.* Express Co (1874) 56 N. Y. (11 Sickels) 585; Twomley *v.* Central Park R. R. Co. (1878) 69 N. Y. (24 Sickels) 158. Cp. Jones *v.* Boyce, 1 Stark. 493.

(*q*) Eckert *v.* Long Island R. R. Co. (1871) 43 N. Y. 502; 3 Am. Rep. 721 (action by representative of a man killed in getting a child off the railway track in front of a train which was being negligently driven).

See addenda page xxxii.

for a contrary doctrine would have the effect of making it safer for the wrong-doer to create a great risk than a small one. Or we may put it thus; that the law does not think so meanly of mankind as to hold it otherwise than a natural and probable consequence of a helpless person being put in danger that some able bodied person should expose himself to the same danger to effect a rescue.

Difficulty where negligence of more than one person concurs.

A peculiar difficulty may arise in cases where the acts or omissions of two persons concur to produce damage to a third. If Peter's negligent act or default is connected with John's damage by a chain of "natural and probable" consequence, Peter is liable to John. Can the voluntary act of a third person, say Andrew, be a link in such a chain? or does Andrew's liability exclude Peter's? Must we stop at the first act of an accountable person? or may Peter be liable for giving Andrew the opportunity of a mischievous act, and Andrew for acting on the opportunity? There seems to be no reason for saying that a man is so far entitled to presume that others will act prudently that he may with impunity make obvious occasions for mischievous imprudence. A. leaves the flap of a cellar in an insecure position on a highway where all manner of persons, adult * and infant, wise and foolish, are accustomed [* 392] to pass. B., carelessly passing, or playing with the flap brings it down on C. It may well be that A. should have anticipated and guarded against the risk of a thing so left being meddled with, and therefore is liable to C., though B. also would be liable to C., and of course could not sue A. if he was hurt himself (*r*).

This appears to be the meaning of the statement that "contributory negligence of a third party is no defence," as it is sometimes put: which on the other hand cannot be received as an universal proposition. Peter may have in one sense created the conditions under which Andrew's act or default brings damage on John, and yet that act or default may not be such as a reasonable man in Peter's place could be expected to foresee as likely, or to take precautions against. In circumstances

(*r*) Hughes *v.* Macfie (1863) 2 H. & C. 744; 33 L. J. Ex. 177. Cp. Clark *v.* Chambers (1878) 3 Q. B. D. at pp. 330—336, where other cases to the like effect are collected, or Addison on Torts. 41—45. See especially Dixon *v.* Bell, p. 409, below.

of this kind even trained minds will often take widely different views; but the difference will be found to consist rather in inferences of fact than in principles of law (*s*). The only safe general statement is that "contributory negligence of a third party," if that elliptical phrase is to be used, is not always or *necessarily* a defence.

(*s*) See Daniel *v.* Metrop. R. Co. (1871) L. R. 5 H. L. 45.

* CHAPTER XII. [* 393]

DUTIES OF INSURING SAFETY.

In general, those who in person go about an undertaking attended with risk to their neighbours, or set it in motion by the hand of a servant, are answerable for the conduct of that undertaking with diligence proportioned to the apparent risk. To this rule the policy of the law makes exceptions on both sides. As we have seen in the chapter of General Exception, men are free to seek their own advantage in the ordinary pursuit of business or uses of property, though a probable or even intended result may be to diminish the profit or convenience of others. We now have to consider the cases where a stricter duty has been imposed. As a matter of history, such cases cannot easily be referred to any definite principle. But the ground on which a rule of strict obligation has been maintained and consolidated by modern authorities is the magnitude of the danger, coupled with the difficulty of proving negligence as the specific cause, in the particular event of the danger having ripened into actual harm. The law might have been content with applying the general standard of reasonable care, in the sense that a reasonable man dealing with a dangerous thing—fire, flood-water, poison, deadly weapons, weights projecting or suspended over a thoroughfare, or whatsoever else it be—will exercise a keener foresight and use more anxious precaution than if it were an object unlikely to cause harm, such as a faggot, or a loaf of bread. A prudent * man [* 394] does not handle a loaded gun or a sharp sword in the same fashion as a stick or a shovel. But the course adopted in England has been to preclude questions of detail by making the duty absolute; or, if we prefer to put it in that form, to consolidate the judgment of fact into an unbending rule of law. The law takes notice that certain things are a source of extraordinary risk, and a man who exposes his neighbour to such risk is held, although his act is not of itself wrongful, to insure his neighbour against any consequent harm not due to some cause beyond human foresight and control.

Exceptions to general limits of duties of caution.

Rylands *v.* Fletcher.

Various particular rules of this kind (now to be regarded as applications of a more general one) are recognized in our law from early times. The generalization was effected as late as 1868, by the leading case of Rylands *v.* Fletcher, where the judgment of the Exchequer Chamber delivered by Blackburn J. was adopted in terms by the House of Lords.

The nature of the facts in Fletcher *v.* Rylands, and the question of law raised by them, are for our purpose best shown by the judgment itself (*a*):—

Judgment of Ex. Ch.

"It appears from the statement in the case, that the plaintiff was damaged by his property being flooded by water, which, without any fault on his part broke out of a reservoir, constructed on the defendants' land by the defendants' orders, and maintained by the defendants.

"It appears from the statements in the case, that the coal under the defendants' land had at some remote period been worked out; but this was unknown at the [* 395] * time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for the latent defect in the defendants' subsoil. And it further appears that the defendants selected competent engineers and contractors to make their reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil; but that these persons employed by them in the course of the work became aware of the existence of the ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings.

"It is found that the defendants personally were free from all blame, but that in fact proper care and skill was not used by the persons employed by them, to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was that the reservoir when filled with water burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief.

"The plaintiff, though free from all blame on his

(*a*) L. R. 1 Ex. at p. 278, per Willes, Blackburn, Keating, Mellor, Montague Smith and Lush JJ. For the statements of fact referred to, see at pp. 267—269.

part, must bear the loss unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours; but the question arises whether the duty which the law casts upon him, under such circumstances, is an * absolute [* 396] duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect. . . . .

"We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbours alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be

[* 397] mischievous * if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth or, stenches."

Affirmation thereof by H. L.

Not only was this decision affirmed in the House of Lords (*b*), but the reasons given for it were fully confirmed. "If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbors, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage" (*c*). It was not overlooked that a line had to be drawn between this rule and the general immunity given to land owners for acts done in the "natural user" of their land, or "exercise of ordinary rights"—an immunity which extends, as has already been settled by the House of Lords itself (*d*), even to be obviously probable consequences. Here Lord Cairns pointed out that the defendants had for their own purposes made "a non-natural use" of their land by collecting water "in quantities and in a manner not the result of any work or operation on or under the land."

The detailed illustration of the rule in Rylands *v.* Fletcher, as governing the mutual claims and duties of adjacent landowners, belongs to the law of property [* 398] rather * than to the subject of this work (*e*). We shall return presently to the special classes of cases (more or less discussed in the judgment of the Exchequer Chamber) for which a similar rule of strict responsibility had been established earlier. As laying down a positive rule of law, the decision in Rylands *v.* Fletcher is not open to criticism in this country (*f*).

(*b*) Rylands *v.* Fletcher (1868) L. R. 3 H. L. 330.

(*c*) Lord Cranworth, at p. 340.

(*d*) Chasemore *v.* Richards (1859) 7 H. L. C. 349.

(*e*) See Fletcher *v.* Smith (1877) 2 App. Ca. 781; Humphries *v.* Cousins (1877) 2 C. P. D. 239; Herdman *v.* North Eastern R. Co. (1878) 3 C. P. Div. 168; and for the distinction as to "natural course of user," Wilson *v.* Waddell, H. L. (Sc.) 2 App. Ca. 95.

(*f*) Judicial opinions still differ in the United States. See Bigelow L. C. 497–500. The case has been cited with approval

But in the judgment of the Exchequer Chamber itself the possibility of exceptions is suggested, and we shall see that the tendency of later decisions has been rather to encourage the discovery of exceptions than otherwise. A rule casting the responsibility of an insurer on innocent persons is a hard rule, though it may be a just one; and it needs to be maintained by very strong evidence (*g*) or on very clear grounds of policy. Now the judgment in Fletcher *v.* Rylands (*h*), carefully prepared as it evidently was, hardly seems to make such grounds clear enough for universal acceptance. The liability seems to be rested only in part on the evidently hazardous character of the state of things artificially maintained by the defendants on their land. In part the case is assimilated to that of a nuisance (*i*), and in part, also, traces are apparent of the formerly prevalent theory that a man's voluntary acts, even when lawful and * free from negligence, are *prima* [* 399] *facie* done at his peril (*k*), a theory which modern authorities have explicitly rejected in America, and do not encourage in England, except so far as Rylands *v.* Fletcher may itself be capable of being used for that purpose (*l*). Putting that question aside, one does not see why the policy of the law might not have been satisfied by requiring the defendant to insure diligence in proportion to the manifest risk (not merely the diligence of himself and his servants, but the actual use of due care in the matter, whether by servants, contractors or others), and throwing the burden of proof on him in cases where the matter is peculiarly within his knowledge. This indeed is what the law has done as regards duties of safe repair, as we shall presently see. Doubtless it is possible to consider Rylands *v.* Fletcher as having only fixed a special rule about adjacent landowners (*m*):

---

in Massachusetts (Shipley *v.* Fifty Associates, 106 Mass. 194: Gorham *v.* Gross, 125 Mass. 232; Mears *v.* Dole, 135 Mass. 508); but distinctly allowed in New York: Losee *v.* Buchanan, 51 N. Y. (6 Sickles) 476.

(*g*) See Reg *v.* Commissioners of Sewers for Essex (1885) 14 Q. B. Div. 561.

(*h*) L. R. 1 Ex. 277 *sqq.*

(*i*) See especially at pp. 285–6. But can an isolated accident, however mischievous in its results, be a nuisance? though its consequences may, as where a branch lopped from a tree is left lying across a highway.

(*k*) L. R. 4 Ex. 286–7; 3 H. L. 341.

(*l*) See the Nitro-glycerine Case (1872) 15 Wall. 524; Brown *v.* Kendall (1850) 6 Cush. 292; Holmes *v.* Mather (1875) L. R. 10 Ex. 261.

(*m*) Martin B., E. R. 6 Ex. at p. 223.

but it was certainly intended to enunciate something much wider.

Character of later cases.

Yet no case has been found, not being closely similar in its facts, or within some previously recognized category, in which the unqualified rule of liability without proof of negligence has been enforced. We have cases where damages have been recovered for the loss of animals by the escape, if so it may be called, of poisonous vegetation or other matters from a neighbour's land. Thus the owner of yew trees, whose branches project over his boundary, so that his neighbour's horse eats of them and is thereby poisoned, is held liable (*n*); and the [* 400] same rule has * been applied where a fence of wire rope was in bad repair, so that pieces of rusted iron wire fall from it into a close adjoining that of the occupier, who was bound to maintain the fence, and were swallowed by cattle which died thereof (*o*). In these cases, however, it was not contended, nor was it possible to contend, that the defendants had used any care at all. The arguments for the defence went either on the acts complained of being within the "natural user" of the land, or on the damage not being such as could have been reasonably anticipated (*p*). We may add that having a tree, noxious or not, permanently projecting over a neighbour's land is of itself a nuisance, and letting decayed pieces of a fence, or anything else, fall upon a neighbour's land for want of due repair is of itself a trespass. Then in Ballard *v.* Tomlinson (*q*) the sewage collected by the defendant in his disused well was an absolutely noxious thing, and his case was, not that he had done his best to prevent it from poisoning the water which supplied the plaintiff's well, but that he was not bound to do anything.

Exception of act of God.

On the other hand, the rule in Rylands *v.* Fletcher has been decided by the Court of Appeal not to apply to damage of which the immediate cause is the act of

---

(*n*) Crowhurst *v.* Amersham Burial Board (1878) 4 Ex. D. 5; Wilson *v.* Newberry (1871) L. R. 7 Q. B. 31 is not inconsistent, for there it was only averred that clippings from the defendant's yew trees were on the plaintiff's land; and the clipping might, for all that appeared, have been the act of a stranger.

(*o*) Firth *v.* Bowling Iron Co. (1878) 3 C. P. D. 254.

(*p*) The former ground was chiefly relied on in Crowhurst's case, the latter in Firth's.

(*q*) 29 Ch. Div. 115 (1885.)

God (*r*). And the act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effects. It is enough that the accident should be such as human * foresight [* 401] could not be reasonably expected to anticipate; and whether it comes within this description is a question of fact (*s*). The only material element of fact which distinguished the case referred to from Rylands *v.* Fletcher was that the overflow which burst the defendant's embankment, and set the stored-up water in destructive motion, was due to an extraordinary storm. Now it is not because due diligence has been used that an accident which nevertheless happens is attributable to the act of God. And experience of danger previously unknown may doubtless raise the standard of due diligence for after-time (*t*). But the accidents that happen in spite of actual prudence, and yet might have been prevented by some reasonably conceivable prudence, are not numerous, nor are juries, even if able to appreciate so fine a distinction, likely to be much disposed to apply it (*u*). The authority of Rylands *v.* Fletcher is unquestioned, but Nichols *v.* Marsland has practically empowered juries to mitigate the rule whenever its operation seems too harsh.

Act of stranger, &c.

Again the principal rule does not apply where the immediate cause of damage is the act of a stranger (*x*), nor * where the artificial work which is the [* 402] source of danger is maintained for the common benefit

---

(*r*) Act of God=vis major = *θεοῦ βία*: see D. 19. 2. locati conducti, 25, § 6. The classical signification of "vis major" is however wider for some purposes; Nugent *v.* Smith, 1 C. P. Div. 423, 429, per Cockburn C. J.

(*s*) Nichols *v.* Marsland (1875–6) L. R. 10 Ex. 255; 2 Ex. D. 1. Note that Lord Bramwell, who in Rylands *v.* Fletcher took the view that ultimately prevailed, was also a party to this decision. The defendant was an owner of artificial pools, formed by damming a natural stream, into which the water was finally let off by a system of weirs. The rainfall accompanying an extremely violent thunderstorm broke the embankments, and the rush of water down the stream carried away four county bridges, in respect of which damage the action was brought.

(*t*) See Reg. *v.* Commissioners of Sewers for Essex (1885) in judgment of Q. B. D., 14 Q. B. D. at p. 574.

(*u*) "Whenever the world grows wiser it convicts those that came before of negligence." Bramwell B., L. R. 6 Ex. at p. 222. But juries do not, unless the defendant is a railway company.

(*x*) Box *v.* Jubb (1879) 4 Ex. D. 76; Wilson *v.* Newberry (1871) L. R. 7 Q. B. 31, is really a decision on the same point.

of the plaintiff and the defendant (*y*); and there is some ground for also making an exception where the immediate cause of the harm, though in itself trivial, is of a kind outside reasonable expectation (*z*).

Works required or authorized by law.

There is yet another exception in favour of persons acting in the performance of a legal duty, or in the exercise of powers specially conferred by law. Where a zamíndár maintained, and was by custom bound to maintain, an ancient tank for the general benefit of agriculture in the district, the Judicial Committee agreed with the High Court of Madras in holding that he was not liable for the consequences of an overflow caused by extraordinary rainfall, no negligence being shown (*a*). In the climate of India the storing of water in artificial tanks is not only a natural but a necessary mode of using land (*b*). In like manner the owners of a canal constructed under the authority of an Act of Parliament are not bound at their peril to keep the water from escaping into a mine worked under the canal [* 403] (*c*). On the same principle a railway * company authorized by Parliament to use locomotive engines on its line is bound to take all reasonable measures of precaution to prevent the escape of fire from its engines, but is not bound to more. If, notwithstanding the best practicable care and caution, sparks do escape and set fire to the property of adjacent owners, the company is not liable (*d*). The burden of proof

---

(*y*) Carstairs *v.* Taylor (1871) L. R. 6 Ex. 217; cp. Madras R. Co. *v.* Zemindar of Carvatenagaram, L. R. 1 Ind. App. 364.

(*z*) Carstairs *v.* Taylor, above, but the other ground seems the principal one. The plaintiff was the defendant's tenant; the defendant occupied the upper part of the house. A rat gnawed a hole in a rain-water box maintained by the defendant, and water escaped through it and damaged the plaintiff's goods on the ground floor. Questions as to the relation of particular kinds of damage to conventional exceptions in contracts for safe carriage or custody are of course on a different footing. See as to rats in a ship Pandorf *v.* Hamilton, 17 Q. B. Div. 670.

(*a*) Madras R. Co. *v.* Zemindar of Carvatenagaram, L. R. 1 Ind. App. 364; S. C., 14 Ben. L. R. 209.

(*b*) See per Holloway J. in the Court below, 6 Mad. H. C. at p. 184.

(*c*) Dunn *v.* Birmingham Canal Co. (1872) Ex. Ch. L. R. 8 Q. B. 42. The principle was hardly disputed, the point which caused some difficulty being whether the defendants were bound to exercise for the plaintiff's benefit certain optional powers given by the same statute.

(*d*) Vaughan *v.* Taff Vale R. Co. (1860) Ex. Ch. 5 H. & N. 679; 29 L. J. Ex. 247; cp. L. R. 4 H. L. 201, 202; Fremantle *v.* L. & N. W. R. Co. (1861) 10 C. B. N. S. 89; 31 L. J. C. P. 12.

appears to be on the company to show that due care was used (*e*), but there is some doubt as to this (*f*).

Some years before the decision of Rylands *v.* Fletcher the duty of a railway company as to the safe maintenance of its works was considered by the Judicial Committee on appeal from Upper Canada (*g*). The persons whose rights against the company were in question were passengers in a train which fell into a gap in an embankment, the earth having given away by reason of a heavy rain-storm. It was held that "the railway company ought to have constructed their works in such a manner as to be capable of resisting all the violence of weather which in the climate of Canada might be expected, though * perhaps rarely, to occur." And the manner in [* 404] which the evidence was dealt with amounts to holding that the failure of works of this kind under any violence of weather, not beyond reasonable provision, is of itself evidence of negligence. Thus the duty affirmed is a strict duty of diligence, but not a duty of insurance. Let us suppose now (what is likely enough as matter of fact) that in an accident of this kind the collapse of the embankment throws water, or earth, or both, upon a neighbour's land so as to do damage there. The result of applying the rule in Rylands *v.* Fletcher will be that the duty of the railway company as landowner to the adjacent landowner is higher than its duty as carrier to persons whom it has contracted to carry safely; or property is more highly regarded than life or limb, and a general duty than a special one.

G. W. R. Co. of Canada *v.* Braid.

If the embankment was constructed under statutory authority (as in most cases it would be) that would bring the case within one of the recognized exceptions to

(*e*) The escape of sparks has been held to be *prima facie* evidence of negligence; Piggott *v.* E. C. R. Co. (1846) 3 C. B. 229; 15 L. J. C. P. 235; cp. per Blackburn J. in Vaughan *v.* Taff Vale R. C.

(*f*) Smith *v.* L. & S. W. R. Co. (1870) Ex. Ch. L. R. 6 C. P. 14 seems to imply the contrary view; but Piggott *v.* E. C. R. Co. was not cited. It may be that in the course of a generation the presumption of negligence has been found no longer tenable, experience having shown the occasional escape of sparks to be consistent with all practicable care. Such a reaction would hardly have found favour, however, with the Court which decided Fletcher *v.* Rylands in the Exchequer Chamber.

(*g*) G. W. R. Co. of Canada *v.* Braid (1863) 1 Moo. P. C. N. S. 101. There were some minor points on the evidence (whether one of the sufferers was not travelling at his own risk, &c.), which were overruled or regarded as not open, and therefore not noticed in the text.

Rylands *v.* Fletcher. But a difficulty which may vanish in practice is not therefore inconsiderable in principle.

Other cases of insurance liability.

We shall now shortly notice the authorities, antecedent to or independent of Rylands *v.* Fletcher, which establish the rule of absolute or all but absolute responsibility for certain special risks.

Duty of keeping in cattle.

Cattle trespass is an old and well settled head, perhaps the oldest. It is the nature of cattle and other live stock to stray if not kept in, and to do damage if they stray; and the owner is bound to keep them from straying on the land of others at his peril, though liable only for natural and probable consequences, not for an unexpected event, such as a horse not previously known to be vicious kicking [*405] *a human being (*h*). So strict is the rule, that if any part of an animal which the owner is bound to keep in is over the boundary, this constitutes a trespass. The owner of a stallion has been held liable on this ground for damage done by the horse kicking and biting the plaintiff's mare through a wire fence which separated their closes (*i*). The result of the authorities is stated to be "that in the case of animals trespassing on land, the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act if done by himself would have been a trespass" (*k*).

Blackstone (*l*) says that "a man is answerable for not only his own trespass, but that of his cattle also:" but in the same breath he speaks of "negligent keeping" as the ground of liability, so that it seems doubtful whether the law was then clearly understood to be as it was laid down a century later in Cox *v.* Burbridge (*m*). Observe that the only reason given in the earlier books (as indeed it still prevails in quite recent cases) is the archaic one that trespass by a man's cattle is equivalent to trespass by himself.

The rule does not apply to damage done by cattle

(*h*) Cox *v.* Burbridge (1863) 13 C. B. N. S. 430; 32 L. J. C. P. 89.

(*i*) Ellis *v.* Loftus Iron Co. (1874) L. R. 10 C. P. 10, a stronger case than Lee *v.* Riley (1865) 18 C. B. N. S. 722; 34 L. J. C. P. 212, there cited and followed.

(*k*) Brett J., L. R. 10 C. P. at p. 13; cp. the remarks on the general law in Smith *v.* Cook (1875) 1 Q. B. D. 79 (itself a case of contract).

(*l*) Comm. iii. 211.

(*m*) 13 C. B. N. S. 430; 32 L. J. C. P. 89.

straying off a highway on which they are being lawfully driven: in such case the owner is liable only on proof of negligence (*n*); and the law is the same for a town street as for a country road (*o*).

* "Whether the owner of a dog is answer- [* 406] able in trespass for every unauthorized entry of the animal into the land of another, as is the case with an ox," is an undecided point. The better opinion seems to favour a negative answer (*p*).

Dangerous or vicious animals.

Closely connected with this doctrine is the responsibility of owners of dangerous animals. "A person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril." If it escapes and does mischief, he is liable without proof of negligence, neither is proof required that he knew the animal to be mischievous, if it is of a notoriously fierce or mischievous species (*q*). If the animal is of a tame and domestic kind, the owner is liable only on proof that he knew the particular animal to be "accustomed to bite mankind," as the common form of pleading ran in the case of dogs, or otherwise vicious; but when such proof is supplied, the duty is absolute as in the former case. It is enough to show that the animal has on foregoing occasions manifested a savage disposition, whether with the actual result of doing mischief on any of those occasions or not (*r*). But the necessity of proving the *scienter*, as it used to be called from the language of pleadings, is often a greater burden on the plaintiff than that of proving negligence would be; and as regards injury to cattle or sheep it has been done away with by statute. And the occupier of the place where a dog is * kept is presumed [* 407] for this purpose to be the owner of the dog (*s*).

(*n*) Goodwin *v.* Cheveley (1859) 4 H. & N. 631; 28 L. J. Ex. 298. A contrary opinion was expressed by Littleton, 20 Edw. IV. cited in Read *v.* Edwards, 17 C. B. N. S. 245; 34 L. J. C. P. at p. 32.

(*o*) Tillett *v.* Ward (1882) 10 Q. B. D. 17, where an ox being driven through a town strayed into a shop.

(*p*) Read *v.* Edwards (1864) 17 C. B. N. S. 245; 34 L. J. C. P. 31; and see Millen *v.* Fawdry, Latch, 119.

(*q*) As a monkey: May *v.* Burdett (1846) 9 Q. B. 101, and 1 Hale, P. C. 430, there cited.

(*r*) Worth *v.* Gilling (1866) L. R. 2 C. P. 1. As to what is sufficient notice to the defendant through his servants, Baldwin *v.* Casella (1872) L. R. 7 Ex. 325: Applebee *v.* Percy (1874) L. R. 9 C. P. 647.

(*s*) 28 & 29 Vict. c. 60 (A. D. 1865). There is a similar Act for Scotland, 26 & 27 Vict. c. 100. See Campbell on Negligence, 2nd

The word "cattle" includes horses (*t*) and perhaps pigs (*u*).

Fire, fire-arms, &c.

The risk incident to dealing with fire, fire-arms, explosive or highly inflammable matters, corrosive or otherwise dangerous or noxious fluids, and (it is apprehended) poisons, is accounted by the common law among those which subject the actor to strict responsibility. Sometimes the term "consummate care" is used to describe the amount of caution required: but it is doubtful whether even this be strong enough. At least, we do not know of any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him.

Duty of keeping in fire.

As to fire, we find it in the fifteenth century stated to be the custom of the realm (which is the same thing as the common law) that every man must safely keep his own fire so that no damage in any wise happen to his neighbour (*x*). In declaring on this custom, however, the averment was "ignem suum *tam negligenter* custodivit:" and it does not appear whether the allegation of negligence was traversable or not (*y*). We shall see that later authorities have adopted the stricter view.

The common law rule applied to a fire made out of [* 408] * doors (for burning weeds or the like) as well as to fire in a dwelling-house (*z*). Here too it looks as if negligence was the gist of the action, which is described (in Lord Raymond's report) as "case grounded upon the common custom of the realm for negligently keeping his fire." *Semble*, if the fire were carried by sudden tempest it would be excusable as the act of God. Liability for domestic fires has been dealt with by statute, and a man is not answerable for damage done by a fire which began in his house or on his land by accident and without negligence (*a*).

---

ed. pp. 53–55. Further protection against mischievous or masterless dogs is given by 34 & 35 Vict. c. 56, a statute of public police regulation outside the scope of this work.

(*t*) Wright *v.* Pearson (1869) L. R. 4 Q. B. 582.

(*u*) Child *v.* Hearn (1874) L. R. 9 Ex. 176 (on a different Act).

(*x*) Y. B. 2 Hen. IV. 18, pl. 5.

(*y*) Blackstone (i. 431) seems to assume negligence as a condition of liability.

(*z*) Tubervil or Tuberville *v.* Stamp, 1 Salk. 13, s. c. 1 Ld. Raym. 264.

(*a*) 14 Geo. 3, c. 78, s. 86, as interpreted in Filliter *v.* Phippard (1847) 11 Q. B. 347; 17 L. J. Q. B. 89. There was an earlier

The use of fire for non-domestic purposes, if we may coin the phrase, remains a ground of the strictest responsibility.

Carrying fire in locomotives.

Decisions of our own time have settled that one who brings fire into dangerous proximity to his neighbour's property, in such ways as by running locomotive engines on a railway without express statutory authority for their use (*b*), or bringing a traction engine on a highway (*c*), does so at his peril.

* It seems permissible to entertain some doubt[* 409] as to the historical foundation of this doctrine, and in the modern practice of the United States it has not found acceptance (*d*). In New York it has, after careful discussion, been expressly disallowed (*e*).

Firearms: Dixon *v.* Bell.

Loaded fire-arms are regarded as highly dangerous things, and persons dealing with them are answerable for damage done by their explosion, even if they have used apparently sufficient precaution. A man sent his maid-servant to fetch a flint-lock gun which was kept loaded, with a message to the master of the house to

---

statute of Anne to a like effect; 1 Blackst. Comm. 431; and see per Cur. in Filliter *v.* Phippard. It would seem that even at common law the defendant would not be liable unless he knowingly lighted or kept some fire to begin with; for otherwise how could it be described as *ignis suus?*

(*b*) Jones *v.* Festiniog R. Co. (1868) L. R. 3 Q. B. 733. Here diligence was proved, but the company held nevertheless liable. The rule was expressly stated to be an application of the wider principle of Rylands *v.* Fletcher; see per Blackburn J. at p. 736.

(*c*) Powell *v.* Fall (1880) 5 Q. B. Div. 597. The use of traction engines on highways is regulated by statute, but not authorized in the sense of diminishing the owner's liability for nuisance or otherwise; see the sections of the Locomotive Acts, 1861 and 1865, in the judgment of Mellor J. at p. 598. The dictum of Bramwell L. J. at p. 601, that Vaughan *v.* Taff Vale R. Co. (1860) Ex. Ch. 5 H. & N. 679; 29 L. J. Ex. 247; p. 403, above, was wrongly decided, is extra judicial. That case was not only itself decided by a Court of co-ordinate authority, but has been approved in the House of Lords; Hammersmith R. Co. *v.* Brand (1869) L. R. 4 H. L. at p. 202; and see the opinion of Blackburn J. at p. 197.

(*d*) It appears to be held everywhere that unless the original act is in itself unlawful, the gist of the action is negligence; see Cooley on Torts, 589—594.

(*e*) Losee *v.* Buchanan (1873) 51 N. Y. 476; the owner of a steam-boiler was held not liable, independently of negligence, for an explosion which threw it into the plaintiff's buildings. For the previous authorities as to fire, uniformly holding that in order to succeed the plaintiff must prove negligence, see at pp. 487-8. Rylands *v.* Fletcher is disapproved as being in conflict with the current of American authority.

take out the priming first. This was done, and the gun delivered to the girl; she loitered on her errand, and (thinking, presumably, that the gun would not go off) pointed it in sport at a child and drew the trigger. The gun went off and the child was seriously wounded. The owner was held liable, although he had used care, perhaps as much care as would commonly be thought enough. "It was incumbent on him who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing of the contents. The gun ought to have been so left as to be out of all reach [* 410] of doing harm" (*f*). This amounts to * saying that in dealing with a dangerous instrument of this kind the only caution that will be held adequate in point of law is to abolish its dangerous character altogether. Observe that the intervening negligence of the servant (which could hardly by any ingenuity have been imputed to her master as being in the course of her employment) was no defence. Experience unhappily shows that if loaded fire-arms are left within the reach of children or fools, no consequence is more natural or probable than that some such person will discharge them to the injury of himself or others.

Explosives and other dangerous goods.

On a like principle it is held that people sending goods of an explosive or dangerous nature to be carried are bound to give reasonable notice of their nature, and, if they do not, are liable for resulting damage. So it was held where nitric acid was sent to a carrier without warning, and the carrier's servant, handling it as he would handle a vessel of any harmless fluid, was injured by its escape (*g*). The same rule has been applied in British India to the case of an explosive mixture being sent for carriage by railway without warning of its character, and exploding in the railway company's office, where it was being handled along with other goods (*h*); and it has been held in a similar case in Massachusetts that the consignor's liability is none the less because the danger of the transport, and the

(*f*) Dixon *v.* Bell (1816) 5 M. & S. 198, and in Bigelow L. C. 568. It might have been said that sending an incompetent person to fetch a loaded gun was evidence of negligence (see the first count of the declaration); but that is not the ground taken by the Court (Lord Ellenborough C. J. and Bayley J.).

(*g*) Farrant *v.* Barnes (1862) 11 C. B. N. S. 553; 31 L. J. C. P. 137. The duty seems to be antecedent, not incident, to the contract of carriage.

(*h*) Lyell *v.* Ganga Dai, I. L. R. 1 All. 60.

damage actually resulting, * have been in- [* 411] creased by another consignor independently sending other dangerous goods by the same conveyance (*i*).

Gas escapes.

Gas (the ordinary illuminating coal-gas) is not of itself, perhaps, a dangerous thing, but with atmospheric air forms a highly dangerous explosive mixture, and also makes the mixed atmosphere incapable of supporting life (*j*). Persons undertaking to deal with it are therefore bound, at all events, to use all reasonable diligence to prevent an escape which may have such results. A gas-fitter left an imperfectly connected tube in the place where he was working under a contract with the occupier; a third person, a servant of that occupier, entering the room with a light in fulfilment of his ordinary duties, was hurt by an explosion due to the escape of gas from the tube so left; the gas-fitter was held liable as for a "misfeasance independent of contract" (*k*).

Poisonous drugs: Thomas *v.* Winchester.

Poisons can do as much mischief as loaded fire-arms or explosives, though the danger and the appropriate precautions are different.

A wholesale druggist in New York purported to sell extract of dandelion to a retail druggist. The thing delivered was in truth extract of belladonna, which by the negligence of the wholesale dealer's assistant had been wrongly labelled. By the retail druggist this extract was sold to a country practitioner, and by him to a customer who took it as and for extract of dandelion, and thereby * was made seriously ill. The [* 412] Court of Appeals held the wholesale dealer liable to the consumer. "The defendant was a dealer in poisonous drugs . . . . The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label." And the existence of a contract between the defendant and the immediate purchaser from him could make no difference, as its non existence would have made none. "The plaintiff's injury and their remedy

(*i*) Boston *v.* Albany R. R. Co. *v.* Shanly (1871) 107 Mass. 568; ("daulin," a nitro-glycerine compound, and exploders, had been ordered by one customer of two separate makers, and by them separately consigned to the railway company without notice of their character: held on demurrer that both manufacturers were rightly sued in one action by the company).

(*j*) See Smith *v.* Boston Gas Light Co., 129 Mass. 318.

(*k*) Parry *v.* Smith (1879) 4 C. P. D. 325 (Lopes J.). Negligence was found as a fact.

would have stood on the same principle, if the defendant had given the belladonna to Dr. Foord" (the country practitioner) "without price, or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale"—or administration without sale—"on the faith of the label" (*l*). This case has been thought in England to go too far; but it is hard to see in what respect it goes farther than Dixon *v.* Bell. So far as the cases are dissimilar, the damage would seem to be not more but less remote. If one sends belladonna into the world labelled as dandelion (the two extracts being otherwise distinguishable only by a minute examination), it is a more than probable consequence that some one will take it as and for dandelion and be the worse for it: and this without any action on the part of others necessarily involving want of due care (*m*).

It can hardly be said that a wrongly labelled poison, whose true character is not discoverable by any ordinary examination such as a careful purchaser could or would make, is in itself less dangerous than a loaded gun. The event, indeed, shows the contrary.

Difficulties felt in England: George *v.* Skivington.

[* 413] * Nevertheless difficulties are felt in England about admitting this application of a principle which in other directions is both more widely and more strictly applied in this country than in the United States (*n*). In 1869 the Court of Exchequer made a rather hesitating step towards it, putting their judgment partly on the ground that the dispenser of the mischievous drug (in this case a hair wash) knew that it was intended to be used by the very person whom it in fact injured (*o*). The cause of action seems to have been treated as in the nature of deceit, and Thomas *v.* Winchester does not seem to have been known either to counsel or to the Court. In the line actually taken one sees the tendency to assume that the ground of liability, if any, must be either warranty or fraud. But this is erroneous, as the judgment in Thomas *v.* Winchester carefully and clearly shows. Whether that case was well decided appears to be a perfectly open

(*l*) Thomas *v.* Winchester (1852) 6 N. Y. 397; Bigelow L. C. 602.

(*m*) The jury found that there was not any negligence on the part of the intermediate dealers; the Court, however, were of opinion that this was immaterial.

(*n*) See per Brett M. R., Heaven *v.* Pender (1883) 11 Q. B. Div. at p. 514, in a judgment which itself endeavours to lay down a much wider rule.

(*o*) George *v.* Skivington (1869) L. R. 5 Ex. 1

question for our courts (*p*). In the present writer's opinion it is good law, and ought to be followed. Certainly it comes within the language of Parke B. in Longmeid *v.* Holliday (*q*), which does not deny legal responsibility "when any one delivers to another without notice an instrument in its nature dangerous under particular circumstances, as a loaded gun which he himself has loaded, and that other person to whom it is delivered is injured thereby; or if he places it in a * situation easily accessible to a third person [* 414] who sustains damage from it." In that case the defendant had sold a dangerous thing, namely an ill-made lamp, which exploded in use, but it was found as a fact that he sold it in good faith, and it was not found that there was any negligence on his part. As lamps are not in their nature explosive, it was quite rightly held that on these facts the defendant could be liable only *ex contractu*, and therefore not to any person who could not sue on his contract or on a warranty therein expressed or implied.

Duties of occupiers of buildings, &c., in respect of safe repair.

We now come to the duties imposed by law on the occupiers of buildings, or persons having the control of other structures intended for human use and occupation, in respect of the safe condition of the building or structure. Under this head there are distinctions to be noted both as to the extent of the duty, and as to the persons to whom it is owed.

Extent of the duty.

The duty is founded not on ownership, but on possession, in other words, on the structure being maintained under the control and for the purposes of the person held answerable. It goes beyond the common doctrine of responsibility for servants, for the occupier cannot discharge himself by employing an independent contractor for the maintenance and repair of the structure, however careful he may be in the choice of that contractor. Thus the duty is described as being impersonal rather than personal. Personal diligence on

(*p*) Dixon *v.* Bell (1816) 5 M. & S. 198; Bigelow L. C. 568 (*supra*, p. 409), has never been disapproved that we know of, but has not been so actively followed that the Court of Appeal need be precluded from free discussion of the principle involved. In Langridge *v.* Levy (1837) 2 M. & W. at p. 530, the Court was somewhat astute to avoid discussing that principle, and declined to commit itself. Dixon *v.* Bell is cited by Parke B. as a strong case, and apparently with hesitating acceptance, in Longmeid *v.* Holliday (1851) 6 Ex. 761; 20 L. J. Ex. 430.

(*q*) 20 L. J. Ex. at p. 430.

the part of the occupier and his servants is immaterial. The structure has to be in a reasonably safe condition, so far as the exercise of reasonable care and skill can [* 415] make it so (*r*). To that extent there is * a limited duty of insurance, as one may call it, though not a strict duty of insurance such as exists in the classes of cases governed by Rylands *v.* Fletcher.

Modern date of the settled rule: Indermaur *v.* Dames.

The separation of this rule from the ordinary law of negligence, which is inadequate to account for it, has been the work of quite recent times. As lately as 1864 (*s*) the Lord Chief Baron Pigot (of Ireland), in a very careful judgment, confessed the difficulty of discovering any general rule at all. Two years later a judgment of the Court of Common Pleas, delivered by Willes J., and confirmed by the Exchequer Chamber, gave us an exposition which has since been regarded on both sides of the Atlantic as a leading authority (*t*). The plaintiff was a journeyman gas-fitter, employed to examine and test some new burners which had been supplied by his employer for use in the defendant's sugar-refinery. While on an upper floor of the building, he fell through an unfenced shaft which was used in working hours for raising and lowering sugar. It was found as a fact that there was no want of reasonable care on the plaintiff's part, which amounts to saying that even to a careful person not already acquainted with the building the danger was an unexpected and concealed one. The Court held that on the admitted facts the plaintiff was in the building as "a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission." They therefore had to deal with the general question of law "as to the duty of the occupier of a building with reference to persons resorting thereto [* 416] in the course of business, upon his invitation * express or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class . . . .

"The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is

(*r*) Per Montague Smith J. in Ex. Ch., Francis *v.* Cockrell (1870) Ex. Ch. L. R. 5 Q. B. 501, 513. Other cases well showing this point are Pickard *v.* Smith, 10 C. B. N. S. 470; John *v.* Bacon (1870) L. R. 5 C. P. 437.

(*s*) Sullivan *v.* Waters, 14 Ir. C. L. R. 460.

(*t*) Indermaur *v.* Dames (1866) L. R. 1 C. P. 274; 2 C. P. 311; constantly cited in later cases, and reprinted in Bigelow L. C.

such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

"And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact" (*u*).

The Court goes on to admit that "there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place would reasonably be, having regard to the contrivances necessarily used in carrying on the business." On the facts they held that "there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant, upon business in which he was concerned; that there was by reason of the shaft unusual danger, known to the defendant; and that the plaintiff sustained damage by reason of that danger, and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it." The judgment in the Exchequer Chamber (*x*) is little more than a simple affirmation of this.

Persons entitled to safety.

* It is hardly needful to add that a custo- [* 417] mer, or other person entitled to the like measure of care, is protected not only while he is actually doing his business, but while he is entering and leaving (*y*). And the amount of care required is so carefully indicated by Willes J. that little remains to be said on that score. The recent cases are important chiefly as showing in respect of what kinds of property the duty exists, and what persons have the same rights as a customer. In both directions the law seems to have become, on the whole, more stringent in the present generation. With regard to the person, one acquires this right to safety by being upon the spot, or engaged in work on

(*u*) L. R. 1 C. P. at p. 288.

(*x*) L. R. 2 C. P. 311.

(*y*) Chapman *v.* Rothwell (1858) 1 E. B. & E. 168; 27 L. J. Q. B. 315; treated as a very plain case, where a trap-door was left open in the floor of a passage leading to the defendant's office.

or about the property whose condition is in question, in the course of any business in which the occupier has an interest. It is not necessary that there should be any direct or apparent benefit to the occupier from the particular transaction (*z*). Where gangways for access to ships in a dock were provided by the dock company, the company has been held answerable for their safe condition to a person having lawful business on board one of the ships; for the providing of access for all such persons is part of a dock-owner's business; they are paid for it by the owners of the ships on behalf of all who use it (*a*). A workman was employed under contract with a ship-owner to paint his ship lying in a dry dock, and the dock-owner provided a staging for the workmen's use; a rope by which the staging was supported, not being of proper strength, broke and let [* 418] down the staging, and the * man fell into the dock and was hurt; the dock-owner was held liable to him (*b*). It was contended that the staging had been delivered into the control of the shipowner; and became as it were part of the ship; but this was held no reason for discharging the dock-owner from responsibility for the condition of the staging as it was delivered. Persons doing work on ships in the dock "must be considered as invited by the dock-owner to use the dock and all appliances provided by the dock-owner as incident to the use of the dock" (*c*).

Duty in respect of carriages, ships, &c.

The possession of any structure to which human beings are intended to commit themselves or their property, animate or inanimate, entails this duty on the occupier, or rather controller. It extends to gangways or staging in a dock, as we have just seen; to a temporary stand put up for seeing a race or the like (*d*); to car-

(*z*) See Holmes *v.* N. E. R. Co. (1869–71) L. R. 4 Ex. 254; in Ex. Ch. L. R. 6 Ex. 123; White *v.* France (1877) 2 C. P. D. 308.

(*a*) Smith *v.* London & St. Katharine Docks Co. (1868) L. R. 3 C. P. 326 (Bovill C. J. and Byles J., *dub.* Keating J.).

(*b*) Heaven *v.* Pender (1883) 11 Q. B. Div. 503.

(*c*) Per Cotton and Bowen L. JJ. at p. 515. The judgment of Brett M. R. attempts to lay down a wider principle with which the Lords Justices did not agree. See p. 354, above. It must be taken as a fact, though it is not clearly stated, that the defective condition of the rope might have been discovered by reasonably careful examination when the staging was put up.

(*d*) Francis *v.* Cockrell (1870) Ex. Ch. L. R. 5 Q. B. 184, 501. The plaintiff had paid money for admission, therefore there was a duty *ex contractu*, but the judgments in the Ex. Ch., see especially per Martin B., also affirm a duty independent of contract. This is one of the most explicit authorities showing that the duty extends to the acts of contractors as well as servants.

riages travelling on a railway or road (*e*), or in which goods are despatched (*f*); to ships (*g*); and to market-places (*h*).

A railway passenger using one company's train with * a ticket issued by another company under [* 419] an arrangement made between the companies for their common benefit is entitled, whether or not he can be said to have contracted with the first-mentioned company, to reasonably safe provision for his conveyance, not only as regards the construction of the carriage itself, but as regards its fitness and safety in relation to other appliances (as the platform of a station) in connexion with which it is intended to be used (*i*). Where goods are lawfully shipped with the shipowner's consent, it is the shipowner's duty (even if he is not bound to the owner by any contract) not to let other cargo which will damage them be stowed in contact with them (*j*). Owners of a cattle-market are bound to leave the market-place in a reasonably safe condition for the cattle of persons who come to the market and pay toll for its use (*k*).

Limits of the duty.

In the various applications we have mentioned, the duty does not extend to defects incapable of being discovered by the exercise of reasonable care, such as latent flaws in metal (*l*); though it does extend to all

---

(*e*) Foulkes *v.* Metrop. District R. Co. (1880) 5 C. P. Div. 157; Moffat *v.* Bateman (1869) L. R. 3 P. C. 115.

(*f*) Elliot *v.* Hall (1885) 15 Q. B. D. 315. The seller of coals sent them to the buyer in a truck with a dangerously loose trap-door in it, and the buyer's servant in the course of unloading the truck fell through and was hurt.

(*g*) Hayn *v.* Culliford (1879) 4 C. P. Div. 182.

(*h*) Lax *v.* Corporation of Darlington (1879) 5 Ex. Div. 28.

(*i*) Foulkes *v.* Metrop. District R. Co. (1880) 5 C. P. Div. 157.

(*j*) Hayn *v.* Culliford (1879) 4 C. P. Div. 182.

(*k*) Lax *v.* Corporation of Darlington (1879) 5 Ex. Div. 28 (the plaintiff's cow was killed by a spiked fence round a statue in the market place). A good summary of the law, as far as it goes, is given in the argument of Cave J. (then Q. C.) for the plaintiff at p. 31. The question of the danger being obvious was considered not open on the appeal; if it had been, *qu.* as to the result, per Bramwell L. J.

(*l*) Readhead *v.* Midland R. Co. (1869) Ex. Ch. L. R. 4 Q. B. 379; a case of contract between carrier and passenger, but the principle is the same, and indeed the duty may be put on either ground, see Hyman *v.* Nye (1881) 6 Q. B. D. 685, 689, per Lindley J. This does not however qualify the law as to the seller's implied warranty on the sale of a chattel for a specific purpose; there the warranty is absolute that the chattel is reasonably fit for that purpose, and there is no exception of latent defects: Randall *v.* Newson (1877) 2 Q. B. Div. 102.

[* 420] such as care and * skill (not merely care and skill on the part of the defendant) can guard against (*l*).

Again, when the builder of a ship or carriage, or the maker of a machine, has delivered it out of his own possession and control to a purchaser, he is under no duty to persons using it as to its safe condition, unless the thing was in itself of a noxious or dangerous kind, or (it seems), unless he had actual knowledge of its being in such a state as would amount to a concealed danger to persons using it in an ordinary manner and with ordinary care (*m*).

Duty towards passers by.

Occupiers of fixed property are under a like duty towards persons passing or being on adjacent land by their invitation in the sense above mentioned, or in the exercise of an independent right.

In Barnes *v.* Ward (*n*), the defendant, a builder, had left the area of an unfinished house open and unfenced. A person lawfully walking after dark along the public path on which the house abutted fell into the area and was killed. An action was brought under Lord Campbell's Act, and the case was twice argued; the main point for the defence being that the defendant had only dug a hole in his own land, as he lawfully might, and was not under any duty to fence or guard it, as it did not interfere with the use of the right of way. The Court held there was a good cause of action, the excavation being so close to the public way as to make it unsafe to persons using it with ordinary care. The making of such an excavation amounts to a public nuisance "even though the danger consists in the risk of accidentally [* 421] deviating from the * road." Lately it has been held that one who by lawful authority diverts a public path is bound to provide reasonable means to warn and protect travellers against going astray at the point of diversion (*o*).

In Corby *v.* Hill (*p*) the plaintiff was a person using

(*l*) Hyman *v.* Nye (1881) 6 Q. B. D. at p. 687.

(*m*) Winterbottom *v.* Wright, 10 M. & W. 109; Collis *v.* Selden (1868) L. R. 3 C. P. 495; Losee *v.* Clute, 51 N. Y. 494.

(*n*) 9 C. B. 392; 19 L. J. C. P. 195 (1850); cp. D. 9. 2, ad leg. Aquil. 28.

(*o*) Hurst *v.* Taylor (1885) 14 Q. B. D. 918; defendants, railway contractors, had (within the statutory powers) diverted a footpath to make the line, but did not fence off the old direction of the path; plaintiff, walking after dark, followed the old direction, got on the railway, and fell over a bridge.

(*p*) 4 C. B. N. S. 556; 27 L. J. C. P. 318 (1858).

a private way with the consent of the owners and occupiers. The defendant had the like consent, as he alleged, to put slates and other materials on the road. No light or other safeguard or warning was provided. The plaintiff's horse, being driven on the road after dark, ran into the heap of materials and was injured. It was held immaterial whether the defendant was acting under licence from the owners or not. If not, he was a mere trespasser; but the owners themselves could not have justified putting a concealed and dangerous obstruction in the way of persons to whom they had held out the road as a means of access (*q*).

Here the plaintiff was (it seems) (*r*) only a licensee, but while the licence was in force he was entitled not to have the condition of the way so altered as to set a trap for him. The case, therefore, marks exactly the point in which a licensee's condition is better than a trespasser's.

Presumption of negligence (*res ipsa loquitur*).

Where damage is done by the falling of objects into a highway from a building, the modern rule is that the accident, in the absence of explanation, is of itself * evidence of negligence. In other words, [* 422] the burden of proof is on the occupier of the building. If he cannot show that the accident was due to some cause consistent with the due repair and careful management of the structure, he is liable. The authorities, though not numerous, are sufficient to establish the rule, one of them being the decision of a Court of Appeal. In Byrne *v.* Boadle (*s*) a barrel of flour fell from a window in the defendant's warehouse in Liverpool, and knocked down the plaintiff, who was lawfully passing in the public street. There was no evidence to show how or by whom the barrel was being handled. The Court said this was enough to raise against the defendant a presumption of negligence which it was for him to rebut. "It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the ware-

(*q*) Cp. Sweeny *v.* Old Colony & Newport R. R. Co. (1865) 10 Allen (Mass.) 368, and Bigelow L. C. 660.

(*r*) The language of the judgments leaves it not quite clear whether the continued permission to use the road for access to a public building (the Hanwell Lunatic Asylum) did not amount to an "invitation" in the special sense of this class of cases.

(*s* 2 H. & C. 722; 33 L. J. Ex. 13, and in Bigelow L. C. 578 (1863).

house to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence" (*t*). This was followed, perhaps extended, in Kearney *v.* London, Brighton and South Coast Railway Co. (*u*). There, as the plaintiff was passing along a highway spanned by a railway bridge, a brick fell out of one of the piers of the bridge and struck and injured him. A train had passed immediately before. There was not any evidence as to the condition of the bridge [* 423] and brick * work, except that after the accident other bricks were found to have fallen out. The Court held the maxim "res ipsa loquitur" to be applicable. "The defendants were under the common law liability to keep the bridge in safe condition for the public using the highway to pass under it;" and when "a brick fell out of the pier of the bridge without any assignable cause except the slight vibration caused by a passing train," it was for the defendants to show, if they could, that the event was consistent with due diligence having been used to keep the bridge in safe repair (*x*). This decision has been followed, in the stronger case of a whole building falling into the street, in the State of New York. "Buildings properly constructed do not fall without adequate cause" (*y*).

In a later case (*z*) the occupier of a house from which a lamp projected over the street was held liable for damage done by its fall, though he had employed a competent person (not his servant) to put the lamp in repair: the fall was in fact due to the decayed condition of the attachment of the lamp to its bracket, which had escaped notice. "It was the defendant's duty to make the lamp reasonably safe, the contractor failed to do that . . . . therefore the defendant has not done his duty, and he is liable to the plaintiff for the consequences" (*a*). In this case negligence on the contractor's part was found as a fact.

Combining the principles affirmed in these authorities, we see that the owner of property abutting on a highway is under a positive duty to keep his property

(*t*) Per Pollock C. B. Cp. Scott *v.* London Dock Co. (1865) 3 H. & C. 596; 34 L. J. Ex. 220; p. 363, above.
(*u*) Ex. Ch. L. R. 6 Q. B. 759 (1871).
(*x*) Per Cur. L. R. 6 Ex. at pp. 761, 762.
(*y*) Mullen *v.* St. John, 57 N. Y. 567, 569.
(*z*) Tarry *v.* Ashton (1876) 1 Q. B. D. 314.
(*a*) Per Blackburn J. at p. 319.

from being a * cause of danger to the public [* 424] by reason of any defect either in structure, repair, or use and management, which reasonable care and skill can guard against.

Distinctions.

But where an accident happens in the course of doing on fixed property work which is proper of itself, and not usually done by servants, and there is no proof either that the work was under the occupier's control or that the accident was due to any defective condition of the structure itself with reference to its ordinary purposes, the occupier is not liable (*b*). In other words, he does not answer for the care or skill of an independent and apparently competent contractor in the doing of that which, though connected with the repair of a structure for whose condition the occupier does answer, is in itself merely incident to the contractor's business and under his order and control.

There are cases involving principles and considerations very similar to these, but concerning the special duties of adjacent landowners or occupiers to one another rather than any general duty to the public or to a class of persons. We must be content here to indicate their existence, though in practice the distinction is not always easy to maintain (*c*).

Position of licensees.

Thus far we have spoken of the duties owed to persons who are brought within these risks of unsafe condition or repair by the occupier's invitation on a matter of common interest, or are there in the exercise of a right. We have still to note the plight of him who comes on or near another's property as a "bare licensee." Such an one * appears to be (with the [* 425] possible exception of a mortgagee in possession) about the least favoured in the law of men who are not actual wrong-doers. He must take the property as he finds it, and is entitled only not to be led into danger by "something like fraud" (*d*).

Persons who by the mere gratuitous permission of owners or occupiers take a short cut across a waste piece

---

(*b*) Welfare *v.* London & Brighton R. Co. (1869) L. R. 4 Q. B. 693; a decision on peculiar facts, where perhaps a very little more evidence might have turned the scale in favour of the plaintiff.

(*c*) See Bower *v.* Peate (1876) 1 Q. B. D. 321; Hughes *v.* Percival (1883) 8 App. Ca. 443; and cp. Gorham *v.* Gross, 125, Mass. 232.

(*d*) Willes **J.**, Gautret *v.* Egerton (1867) L. R. 2 C. P. at p. 375.

of land (*e*), or pass over private bridges (*f*), or have the run of a building (*g*), cannot expect to find the land free from holes or ditches, or the bridges to be in safe repair, or the passages and stairs to be commodious and free from dangerous places. If the occupier, while the permission continues, does something that creates a concealed danger to people availing themselves of it, he may well be liable (*h*). And he would of course be liable, not for failure in a special duty, but for wilful wrong, if he purposely made his property dangerous to persons using ordinary care, and then held out his permission as an inducement to come on it. Apart from this improbable case, the licensee's rights are measured, at best, by the actual state of the property at the time of the licence.

"If I dedicate a way to the public which is full of ruts and holes, the public must take it as it is. If I dig a pit in it, I may be liable for the consequences: but, if I do nothing, I am not" (*i*).

The occupier of a yard in which machinery was in motion allowed certain workmen (not employed in his own business) to use, for their own convenience, a path [* 426] crossing * it. This did not make it his duty to fence the machinery at all, or if he did so to fence it sufficiently; though he might have been liable if he had put up an insecure guard which by the false appearance of security acted as a trap (*k*). The plaintiff, by having permission to use the path, had not the right to find it in any particular state of safety or convenience.

"Permission involves leave and licence, but it gives no *right*. If I avail myself of permission to cross a man's land I do so by virtue of a licence, not of right. It is an abuse of language to call it a right: it is an excuse or licence, so that the party cannot be treated as a trespasser" (*l*). In the language of Continental juris-

(*e*) Hounsell *v.* Smyth (1860) 7 C. B. N. S. 731; 29 L. J. C. P. 203.

(*f*) Gautret *v.* Egerton (1867) L. R. 2 C. P. 371.

(*g*) Sullivan *v.* Waters (1864) 14 Ir. C. L. R. 460.

(*h*) Corby *v.* Hill (1858) 4 C. B. N. S. 556; 27 L. J. C. P. 318; p. 421, above.

(*i*) Willes J., L. R. 2 C. P. at p. 373.

(*k*) Bolch *v.* Smith (1862) 7 H. & N. 736; 31 L. J. Ex. 201.

(*l*) Martin B. 7 H. & N. at p. 745. Batchelor *v.* Fortescue (1883) 11 Q. B. Div. 474, 478, seems rather to stand upon the ground that the plaintiff had gone out of his way to create the risk for himself. As between himself and the defendant, he had no title at all to be where he was. Cp. D. 9. 2. ad leg. Aquil. 31, *ad fin.* "culpa ab eo exigenda non est, cum divinare non potuerit an per eam locum aliquis transiturus sit." In Ivay *v.*

prudence, there is no question of *culpa* between a gratuitous licensee and the licensor, as regards the safe condition of the property to which the licence applies. Nothing short of *dolus* will make the licensor liable (*m*).

Host and guest.

Invitation is a word applied in common speech to the relation of host and guest. But a guest (that is, a visitor who does not pay for his entertainment) has not the * benefit of the legal doctrine of invitation [* 427] in the sense now before us. He is in point of law nothing but a licensee. The reason given is that he cannot have higher rights than a member of the household of which he has for the time being become, as it were, a part (*n*). All he is entitled to is not to be led into a danger known to his host, and not known or reasonably apparent to himself.

On the same principle, a man who offers another a seat in his carriage is not answerable for an accident due to any defect in the carriage of which he was not aware (*o*).

Liability of licensor for "ordinary negligence."

It may probably be assumed that a licensor is answerable to the licensee for ordinary negligence (*p*), in the sense that his own act or omission will make him liable if it is such that it would create liability as between two persons having an equal right to be there: for example, if J. S. allows me to use his private road, it will hardly be said that, without express warning, I am to take the risk of J. S. driving furiously thereon. But the whole subject of a licensee's rights and risks is still by no means free from difficulty.

Liability of owner not in occupation?

It does not appear to have been ever decided how far, if at all, an owner of property not in possession can be subject to the kind of duties we have been considering.

Hedges (1882) 9 Q. B. D. 80, the question was more of the terms of the contract between landlord and tenant than of a duty imposed by law. *Quaere*, whether in that case the danger to which the tenant was exposed might not have well been held to be in the nature of a trap. The defect was a non-apparent one, and the landlord knew of it.

(*m*) Cp. Blakemore *v.* Bristol and Exeter R. Co. (1858) 8 E. & B. 1035; 27 L. J. Q. B. 167, where it seems that the plaintiff's intestate was not even a licensee; but see 11 Q. B. D. 516.

(*n*) Southcote *v.* Stanley (1856) 1 H. & N. 247; 25 L. J. Ex. 339. But *quaere* if this explanation be not *obscurum per obscurius*. Cp. Abraham *v.* Reynolds, 5 H. & N. at p. 148, where the same line of thought appears.

(*o*) Moffatt *v.* Bateman (1869) L. R. 3 P. C. 115.

(*p*) Horace Smith 38; Campbell 119.

We have seen that in certain conditions he may be liable for nuisance (*q*). But, since the ground of these special duties regarding safe condition and repair is the [* 428] relation created * by the occupier's express or tacit "invitation," it may be doubted whether the person injured can sue the owner in the first instance, even if the defect or default by which he suffered is, as between owner and occupier, a breach of the owner's obligation.

(*q*) See p. 351, above. Campbell, pp. 26, 27.

*CHAPTER XIII. [* 429]

SPECIAL RELATIONS OF CONTRACT AND TORT.

Original theory of forms of action.

The original theory of the common law seems to have been that there were a certain number of definite and mutually exclusive causes of action, expressed in appropriate forms. The test for ascertaining the existence or non-existence of a legal remedy in a given case was to see whether the facts could be brought under one of these forms. Not only this, but the party seeking legal redress had to discover and use the right form at his peril. So had the defendant if he relied on any special ground of defence as opposed to the *general issue*. If this theory had been strictly carried out, confusion between forms or causes of action would not have been possible. But strict adherence to the requirements of such a theory could be kept up only at the price of intolerable inconvenience. Hence not only new remedies were introduced, but relaxations of the older definitions were allowed. The number of cases in which there was a substantial grievance without remedy was greatly diminished, but the old sharply drawn lines of definition were overstepped at various points, and became obscured. Thus different forms and causes of action overlapped. In many cases the new form, having been introduced for greater practical convenience, simply took the place of the older, as an alternative which in practice was always or almost always preferred: but in other cases one or another remedy might be better according to * the circumstances. Hence dif- [* 430] ferent remedies for similar or identical causes of action remained in use after the freedom of choice had been established with more or less difficulty.

On the debateable ground thus created between those states of fact which clearly give rise to only one kind of action and those which clearly offered an alternative, there arose a new kind of question, more refined and indeterminate than those of the earlier system, because less reducible to the test of fixed forms.

Actions on the case.

The great instrument of transformation was the introduction of actions on the case by the Statute of West-

minster (*a*). Certain types of action on the case became in effect new and well recognized forms of action. But it was never admitted that the virtue of the statute had been exhausted, and it was probably rather the timidity of pleaders than the unwillingness of the judges that prevented the development from being even greater than it was. It may be asked in this connexion why some form of action on the case was not devised to compete with the jurisdiction of the Court of Chancery in enforcing trusts. An action on the case analogous to the action of account, if not the action of account itself, might well have been held to lie against a feoffee to uses at the suit of *cestui que use*. Probably the reason is to be sought in the inadequacy of the common law remedies, which no expansion of pleading could have got over. The theory of a system of equitable rights wholly outside the common law and its process, and inhabiting a region of mysteries unlawful for a common lawyer to meddle with, was not the cause but the consequence of the Court of Chancery's final triumph. [* 431] * The history of the Roman *legis actiones* may in a general way be compared with that of common law pleading in its earlier stages; and it may be found that the praetorian actions have not less in common with our actions on the case than with the remedies peculiar to courts of equity, which our text-writers have habitually likened to them.

Causes of action: modern classification of them as founded on contract or tort.

Forms of action are now abolished in England. But the forms of action were only the marks and appointed trappings of causes of action; and to maintain an action there must still be some cause of action known to the law. Where there is an apparent alternative, we are no longer bound to choose at our peril, and at the very outset, on which ground we will proceed, but we must have at least one definite ground. The question, therefore, whether any cause of action is raised by given facts is as important as ever it was. The question whether there be more than one is not as a rule material in questions between the same parties. But it may be (and has been) material under exceptional conditions: and where the suggested distinct causes of action affect different parties it may still be of capital importance.

In modern English practice, personal (*b*) causes of

(*a*) 13 Edw. 1, c. 24.

(*b*) I do not think it was ever attempted to bring the real actions under this classification.

action cognizable by the superior courts of common law (and now by the High Court in the jurisdiction derived from them) have been regarded as arising either out of contract or out of wrongs independent of contract. This division was no doubt convenient for the working lawyer's ordinary uses, and it received the high sanction of the framers of the Common Law Procedure Act, besides other statutes dealing with procedure. But it does not rest on any historical authority, nor can it be successfully defended as a scientific * dichotomy. [* 432] In fact the historical causes above mentioned have led to intersection of the two regions, with considerable perplexity for the consequence.

We have causes of action nominally in contract which are not founded on the breach of any agreement, and we have torts which are not in any natural sense independent of contract.

This border land between the law of tort and the law of contract will be the subject of examination in this chapter.

Classes of questions arising.

The questions to be dealt with may be distributed under the following heads:—

1. Alternative forms of remedy on the same cause of action.
2. Concurrent or alternative causes of action.
3. Causes of action in tort dependent on a contract not between the same parties.
4. Measure of damages and other incidents of the remedy.

I.—*Alternative Forms of Remedy on the same Cause of Action.*

One cause of action and alternative remedies.

It may be hard to decide whether the particular cases fall under this head or under the second, that is, whether there is one cause of action which the pleader has or had the choice of describing in two ways, or two distinct causes of action which may possibly confer rights on and against different parties. In fact the most difficult questions we shall meet with are of this kind.

The common law doctrine

Misfeasance in doing an act in itself not unlawful is ground for an action on the case (*c*). It is immaterial

(*c*) And strictly, not for an action of trespass; but there are classes of facts which may be regarded as constituting either

of misfeasance.

[* 433] * that the act was not one which the defendant was bound to do at all (*d*). If a man will set about actions attended with risk to others, the law casts on him the duty of care and competence. It is equally immaterial that the defendant may have bound himself to do the act, or to do it competently. The undertaking, if undertaking there was in that sense, is but the occasion and inducement of the wrong. From this root we have, as a direct growth, the whole modern doctrine of negligence. We also have, by a more artificial process, the modern method of enforcing simple contracts, through the specialized form of this kind of action called *assumpsit* (*e*) : the obligation being extended, by a bold and strictly illogical step, to cases of pure non-feasance (*f*), and guarded by the requirement of consideration. Gradually assumpsit came to be thought of as founded on a duty *ex contractu;* so much so that it might not be joined with another cause of action on the case, such as conversion. From a variety of action on the case it had become a perfect species, and in common use its origin was forgotten. But the old root was there still, [* 434] * and had life in it at need. Thus it might happen that facts or pleading which in the current modern view showed an imperfect cause of action in assumpsit would yet suffice to give the plaintiff judgment on the more ancient ground of misfeasance in a duty imposed by law. In the latest period of common law pleading the House of Lords upheld in this manner a declaration for negligence in the execution of an employment, which averred an undertaking of the employment, but not any promise to the plaintiff, nor, in terms,

---

wrongs of misfeasance (case), or acts which might be justified under some common or particular claim of right, but not being duly done fail of such justification and are merely wrongful (trespass).

(*d*) Gladwell *v.* Steggall (1839) 5 Bing. N. C. 733; 8 Scott 60; 8 L. J. C. P. 361; action by an infant for incompetence in surgical treatment. In such an action the plaintiff's consent is material only because without it the defendant would be a mere trespasser, and the incompetence would not be the gist of the action, but matter for aggravation of damages. To the same effect is Pippin *v.* Sheppard (1822) 11 Price 400, holding that a declaration against a surgeon for improper treatment was not bad for not showing by whom the surgeon was retained or to be paid.

(*e*) O. W. Holmes, The Common Law, p. 274 *sqq.*

(*f*) An analogy to this in the Roman theory of *culpa*, under the Lex Aquilia, can hardly be sustained. See the passages in D. 9. 2. collected and discussed in Dr. Grueber's treatise, at pp. 87, 209. On the other hand the decision in Slade's case, 4 Co. Rep. 91 *a*, that the existence of a cause of action in debt did not exclude assumpsit, was in full accordance with the original conception.

any consideration (*g*). And it was said that a breach of duty in the course of employment under a contract would give rise to an action either in contract or in tort at the plaintiff's election (*h*). This, it will be seen, is confined to an active misdoing; notwithstanding the verbal laxity of one or two passages, the House of Lords did not authorize parties to treat the mere non-performance of a promise as a substantive tort (*i*).

There are certain kinds of employment, namely those of a carrier and an innkeeper, which are deemed public in a special sense. If a man holds himself out as exercising one of these, the law casts on him the duty of not refusing the benefit thereof, so far forth as his means extend, to any person who properly applies for it. The innkeeper must not without a reasonable cause refuse to entertain a traveller, or the carrier to convey goods. Thus we have a duty attached to the mere profession of the employment, and antecedent to the formation of any contract; and if the * duty is broken, [* 435] there is not a breach of contract but a tort, for which the remedy under the common law forms of pleading is an action on the case. In effect refusing to enter into the appropriate contract is of itself a tort. Duties of the same class may be created by statute, expressly or by necessary implication; they are imposed for the benefit of the public, and generally by way of return for privileges conferred by the same statutes, or by others *in pari materia*, on the persons or corporations who may be concerned.

Special duty of carriers and inn-keepers by "custom of the realm."

Here the duty is imposed by the general law, though by a peculiar and somewhat anomalous rule; and it gives rise to an obligation upon a simple non-feasance, unless we say that the profession of a "public employment" in this sense is itself a continuing act, in relation to which the refusal to exercise that employment on due demand is misfeasance. But on this latter view there would be no reason why the public profession of any

(*g*) Brown *v.* Boorman (1844) 11 Cl. & F. 1. The defendant's pleader appears to have been unable to refer the declaration to any certain species; to make sure of having it somewhere he pleaded—(1) not guilty; (2) *non assumpsit;* (3) a traverse of the alleged employment.

(*h*) Per Lord Campbell.

(*i*) Courtenay *v.* Earle (1850) 10 C. B. 73; 20 L. J. C. P. 7. See especially the dicta of Maule J. in the course of the argument. In that case it was attempted to join counts, which were in substance for the non-payment of a bill of exchange, with a count in trover.

trade or calling whatever should not have the like consequences; and such an extension of the law has never been proposed.

The term "custom of the realm" has been appropriated to the description of this kind of duties by the current usage of lawyers, derived apparently from the old current form of declaration. It seems however that in strictness "custom of the realm" has no meaning except as a synonym of the common law, so that express averment of it was superfluous (*k*).

Even where the breach of duty is subsequent to a complete contract in any employment of this kind, it was long the prevailing opinion that the obligation was still [* 436] founded * on the custom of the realm, and that the plaintiff might escape objections which (under the old forms of procedure) would have been fatal in an action on a contract (*l*).

Alternative of form does not affect substance of duty or liability.

In all other cases under this head there are not two distinct causes of action even in the alternative, nor distinct remedies, but one cause of action with, at most, one remedy in alternative forms. And it was an established rule, as long as the forms of action were in use, that the rights and liabilities of the parties were not to be altered by varying the form. Where there is an undertaking without a contract, there is a duty incident to the undertaking (*m*), and if it is broken there is a tort, and nothing else. The rule that if there is a specific contract, the more general duty is superseded by it, does not prevent the general duty from being relied on where there is no contract at all (*n*). Even where there is a contract, our authorities do not say that the more general duty ceases to exist, or that a tort cannot be committed; but they say that the duty is "founded on contract." The contract, with its incidents either express or attached by law, becomes the only measure of the duties between the parties. There might be a choice, therefore, between forms of pleading, but the plaintiff could not by any device of form get more than was contained in the defendant's obligation under the contract.

(*k*) Pozzi *v.* Shipton (1839) 8 A. & E. 963, 975; 8 L. J. Q. B. 1. Cp. Tattan *v.* G. W. R. Co. (1860) 2 E. & E. 844; 29 L. J. Q. B. 184; Y. B. 2 Hen. IV. 18, pl. 5.

(*l*) Pozzi *v.* Shipton, last note.

(*m*) Gladwell *v.* Steggall (1839) 5 Bing. N. C. 733; 8 Scott 60; 8 L. J. C. P. 361.

(*n*) Austin *v.* G. W. R. Co. (1867) L. R. 2 Q. B. 442, where the judgment of Blackburn J. gives the true reason. See further below.

Thus an infant could not be made chargeable for what was in substance a breach of contract by suing him in an action on the case; and the rule appears to have been first laid down for this special purpose. All the infants in England would be ruined, it was said, if such [* 437] actions were allowed (*o*). So a purchaser of goods on credit, if the vendor resold the goods before default in payment, could treat this as a conversion and sue in trover; but as against the seller he could recover no more than his actual damage, in other words the substance of the right was governed wholly by the contract (*p*).

Yet the converse of this rule does not hold without qualification. There are cases in which the remedy on a contract partakes of the restrictions usually incident to the remedy for a tort; but there are also cases in which not only an actual contract, but the fiction of a contract, can be made to afford a better remedy than the more obvious manner of regarding the facts.

Moreover it was held, for the benefit of plaintiffs, that where a man had a substantial cause of action on a contract he should not lose its incidents, such as the right to a verdict for nominal damages in default of proving special damage, by framing his action on the case (*q*).

In modern view the obligation is wholly in contract.

Now that forms of pleading are generally abolished or greatly simplified, it seems better to say that wherever there is a contract to do something, the obligation of the contract is the only obligation between the parties with regard to the performance, and any action for failure or negligence therein is an action on the contract; and this whether there was a duty antecedent to the contract or not. So much, in effect, has been laid down by the Court of Appeal as regards the statutory distinction of actions by the County Courts Act, 1867, for certain purposes of * costs, as being [* 438] "founded on contract" or "founded on tort" (*r*).

From this point of view the permanent result of the older theory has been to provide a definite measure for

(*o*) Jennings *v.* Rundall (1799) 1 T. R. 355; p. 48 above.

(*p*) Chinery *v.* Viall (1860) 5 H. & N. 288; 29 L. J. Ex. 180; p. 297 above.

(*q*) Marzetti *v.* Williams (1830) 1 B. & Ad. 415; action by customer against banker for dishonouring cheque.

(*r*) Fleming *v.* Manchester, Sheffield & Lincolnshire R. Co. (1878) 4 Q. B. D. 81. It is impossible to reconcile the grounds of this decision with those of Pozzi *v.* Shipton (1839) 8 A. & E. 963; 8 L. J. Q. B. 1; p. 435 above.

duties of voluntary diligence, whether undertaken by contract or gratuitously, and to add implied warranties of exceptional stringency to the contracts of carriers, innkeepers, and those others (if any) whose employments fall under the special rule attributed to the "custom of the realm" (*s*).

Limits of the rule.

All these rules and restrictions, however, must be taken with regard to their appropriate subject-matter. They do not exclude the possibility of cases occurring in which there is more than an alternative of form.

If John has contracted with Peter, Peter cannot make John liable beyond his contract; that is, where the facts are such that a cause of action would remain if some necessary element of contract, consideration for example, were subtracted, Peter can, so to speak, waive John's promise if he think fit, and treat him in point of form as having committed a wrong; but in point of substance he cannot thereby make John's position worse. In saying this, however, we are still far from [* 439] saying that there can in no case be a * relation between Peter and John which includes the facts of a contract (and to that extent is determined by the obligation of the contract), but in some way extends beyond those facts, and may produce duties really independent of contract. Much less have we said that the existence of such a relation is not to be taken into account in ascertaining what may be John's duties and liabilities to William or Andrew, who has not any contract with John. In pursuing such questions we come upon real difficulties of principle. This class of cases will furnish our next head.

II.—*Concurrent Causes of Action.*

Concurrent causes of action.

Herein we have to consider—

(a) Cases where it is doubtful whether a contract has been formed or there is a contract "implied in law" without any real agreement in fact, and the same act which is a breach of the contract, if any, is at all events a tort;

(*s*) It has been suggested that a shipowner may be under this responsibility, not because he is a common carrier, but by reason of a distinct though similar custom extending to shipowners who carry goods for hire without being common carriers: Nugent *v.* Smith (1876) 1 C. P. D. 14, but the decision was reversed on appeal *ib.* 423, and the propositions of the Court below specifically controverted by Cockburn C. J., see at p. 426 *sqq.* I am not aware of any other kind of employment to which the "custom of the realm" has been held to apply.

(b) Cases where A. can sue B. for a tort though the same facts may give him a cause of action against M. for breach of contract;

(c) Cases where A. can sue B. for a tort though B.'s misfeasance may be a breach of a contract made not with A. but with M.

Cases of tort, whether contract or no contract between same parties.

(a) There are two modern railway cases in which the majority of the Court held the defendants liable on a contract, but it was also said that even if there was no contract there was an independent cause of action. In Denton *v.* Great Northern Railway Company (*t*), an in- * tending passenger was held to have a remedy [* 440] for damage sustained by acting on an erroneous announcement in the company's current time-table, probably on the footing of the time-table being the proposal of a contract, but certainly on the ground of its being a false representation. In Austin *v.* Great Western Railway Company (*u*), an action for harm suffered in some accident of which the nature and particulars are not reported, the plaintiff was a young child just above the age up to which children were entitled to pass free. The plaintiff's mother, who had charge of him, took a ticket for herself only. It was held that the company was liable either on an entire contract to carry the mother and the child (enuring, it seems, for the benefit of both, so that the action was properly brought by the child) (*v*), or independently of contract, because the child was accepted as a passenger, and this cast a duty on the company to carry him safely (*x*). Such a passenger is, in the absence of fraud, in the position of using the railway company's property by invitation, and is entitled to the protection given to persons in that position by a class of authorities now well established (*y*). Whether the company is under quite the same duty towards him, in respect of the amount of diligence required, as towards a passenger with whom there is an actual contract, is not so clear on principle (*z*). The point is not discussed in any of the cases now under review.

(*t*) 5 E. & B. 860; 25 L. J. Q. B. 129 (1856) see p. 250 above, and Principles of Contract, 4th ed. 14. The case is perhaps open to the remark that a doubtful tort and the breach of a doubtful contract were allowed to save one another from adequate criticism.

(*u*) L. R. 2 Q. B. 442 (1867).

(*v*) Per Lush J. at p. 447.

(*x*) Per Blackburn J. at p. 445, and see per Grove J. in Foulkes *v.* Metrop. District R. Co. (1880) 4 C. P. D. at p. 279.

(*y*) See Chap. XII. p. 415 above.

(*z*) See Moffatt *v.* Bateman (1869) L. R. 3. P. C. 115.

Again if a servant travelling with his master on a railway loses his luggage by the negligence of the company's servants, it is immaterial that his ticket was paid for by [* 441] * his master, and he can sue in his own name for the loss. Even if the payment is not regarded as made by the master as the servant's agent, as between themselves and the company (*a*), the company has accepted the servant and his goods to be carried, and is answerable upon the general duty thus arising, a duty which would still exist if the passenger and his goods were lawfully in the train without any contract at all (*b*). Evidently the plaintiff in a case of this kind must make his choice of remedies; and cannot have a double compensation for the same matter, first as a breach of contract and then as a tort: at the same time the rule that the defendant's liability must not be increased by varying the form of the claim is not here applicable, since the plaintiff may rely on the tort notwithstanding the existence of doubt whether there be any contract, or, if there be, whether the plaintiff can sue on it.

Contract "implied in law" and waiver of tort.

On the other hand we have cases in which an obvious tort is turned into a much less obvious breach of contract with the undisguised purpose of giving a better and more convenient remedy. Thus it is an actionable wrong to retain money paid by mistake, or on a consideration which has failed and the like; but in the eighteenth century the fiction of a promise "implied in law" to repay the money so held was introduced, and afforded "a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex aequo et bono* he ought to re- [* 442] fund" (*c*), and even to cases where * goods taken or retained by wrong had been converted into money. The plaintiff was said to "waive the tort" for the purpose of suing in assumpsit on the fictitious contract. Hence the late Mr. Adolphus wrote in his idyllic poem "The Circuiteers":

> "Thoughts much too deep for tears subdue the Court
> When I *assumpsit* bring, and godlike waive a tort" *d*.

(*a*) Suppose the master by accident had left his money at home, and the servant had paid both fares out of his own money: could it be argued that the master had no contract with the company?

(*b*) Marshall *v.* York, Newcastle & Berwick R. Co. (1851) 11 C. B. 655; 21 L. J. C. P. 34; approved by Blackburn J. in Austin *v.* G. W. R. Co. last page.

(*c*) Blackst. iii. 163.

(*d*) L. Q. R. i. 233.

This kind of action was much fostered by Lord Mansfield, whose exposition confessed the fiction of the form while it justified the utility of the substance (*e*).

Implied warranty of agent's authority (Collen *v.* Wright.

Within still recent memory an essentially similar fiction of law has been introduced in the case of an ostensible agent obtaining a contract in the name of a principal whose authority he misrepresents. A person so acting is liable for deceit; but that liability, being purely in tort, does not extend to his executors, neither can he be held personally liable on a contract which he purported to make in the name of an existing principal. To meet this difficulty it was held in Collen *v.* Wright (*f*) that when a man offers to contract as agent there is an implied warranty that he is really authorized by the person named as principal, on which warranty he or his estate will be answerable *ex contractu*. Just as in the case of the old "common counts," the fact that the action lies against executors shows that there is not merely one cause of action capable of being expressed, under the old system of pleading, in different ways, but two distinct though concurrent causes of action, with a remedy upon either at the plaintiff's election.

* We pass from these to the more trouble- [* 443] some cases where the causes of action in contract and in tort are not between the same parties.

Concurrent causes of action against different parties in contract and in tort. Dalyell *v.* Tyrer.

(**b**) There may be two causes of action with a common plaintiff, or the same facts may give Z. a remedy in contract against A. and also a remedy in tort against B.

The lessee of a steam ferry at Liverpool, having to meet an unusual press of traffic, hired a vessel with its crew from other shipowners to help in the work of the ferry for a day. The plaintiff held a season-ticket for the ferry, and therefore had a contract with the lessee to be carried across with due skill and care. He crossed on this day in the hired vessel; by the negligence of some of the crew there was an accident in mooring the vessel on her arrival at the farther shore, and the plaintiff was hurt. He sued not the lessee of the ferry but the owners of the hired vessel; and it was held that

(*e*) Moses *v.* Macferlan, 2 Burr. 1005; cp. Leake on Contracts, 1st ed. 39, 48.

(*f*) Ex. Ch. (1857) 8 E. & B. 647; 27 L. J. Q. B. 215.

he was entitled to do so. The persons managing the vessel were still the servants of the defendants, her owners, though working her under a contract of hiring for the purposes of the ferry; and the defendants would be answerable for their negligence to a mere stranger lawfully on board the vessel or standing on the pier at which she was brought up. The plaintiff was lawfully on their vessel with their consent, and they were not the less responsible to him because he was there in exercise of a right acquired by contract upon a consideration paid to some one else (*g*).

Foulkes *v.* Met. Dist. R. Co.

The latest and most authoritative decision on facts of this kind was given by the Court of Appeal in 1880(*h*).

[* 444] * The plaintiff, a railway passenger with a return ticket alighting at his destination at the end of the return journey, was hurt by reason of the carriages being unsuitable to the height of the platform at that station. This station and platform belonged to one company (the South Western), by whose clerk the plaintiff's ticket had been issued: the train belonged to another company (the District) who used the station and adjoining line under running powers. There was an agreement between the two companies whereby the profits of the traffic were divided. The plaintiff sued the District Company, and it was held that they were liable to him even if his contract was with the South Western Company alone. The District Company received him as a passenger in their train, and were bound to provide carriages not only safe and sound in themselves, but safe with reference to the permanent way and appliances of the line. In breach of this duty they provided, according to the facts as determined by the jury, a train so ordered that "in truth the combined arrangements were a trap or snare," and would have given the plaintiff a cause of action though he had been carried gratuitously (*i*). He had been actually received by the defendants as a passenger, and thereby they undertook the duty of not exposing him to unreasonable peril in any matter incident to the journey.

(*g*) Dalyell *v.* Tyrer (1858) E. B. & E. 899; 28 L. J. Q. B. 52.

(*h*) Foulkes *v.* Metrop. Dist. R. Co., 5 C. P. Div. 157. Cp. Berringer *v.* G. E. R. Co. (1879) 4 C. P. D. 163.

(*i*) Bramwell L. J., 5 C. P. Div. at p. 159. See the judgment of Thesiger L. J. for a fuller statement of the nature of the duty. Comparison of these two judgments leaves it capable of doubt whether the defendants would have been liable for a mere nonfeasance.

(c) There may be two causes of action with a common defendant, or the same act or event which makes A. liable for a breach of contract to B. may make him liable for a tort to Z.

Causes of action in contract and tort at suit of different plaintiffs.

* The case already mentioned of the ser- [* 445] vant travelling by railway with his master would be an example of this if it were determined on any particular state of facts that the railway company contracted only with the master. They would not be less under a duty to the servant and liable for a breach thereof because they might also be liable to the master for other consequences on the ground of a breach of their contract with him (*k*).

Again, an officer in Her Majesty's service and his baggage were carried under a contract made with the carriers on behalf of the Government of India; this did not prevent the carriers from being liable to the officer if his goods were destroyed in the course of the journey by the negligence of their servants. "The contract is no concern of the plaintiff's; the act was none the less a wrong to him" (*l*). He could not charge the defendants with a breach of contract, but they remained answerable for "an affirmative act injurious to the plaintiff's property" (*m*.)

Alton *v.* Midland R. Co., *qu.* whether good law.

The decision of the Court of Common Pleas in Alton *v.* Midland Railway Co. (*n*) is difficult to reconcile with the foregoing authorities. A servant travelling by railway on his master's business (having paid his own fare) received hurt, as was alleged, by the negligence of the * railway company's servants, and the master [* 446] sued the company for loss of service consequent on this injury. It was held that the action would not lie, the supposed cause of action arising, in the opinion of the Court, wholly out of the company's contract of carriage;

(*k*) Marshall's ca. (1851) 11 C. B. 655; 21 L. J. C. P. 34; *supra*, p. 441.

(*l*) Martin *v.* G. I. P. R. Co. (1867) L. R. 3 Ex. 9, per Bramwell B. at p. 14.

(*m*) Channell B. *ibid.*; Kelly C. B. and Pigott B. doubted. The later case of Beecher *v.* G. E. R. Co. (1870) L. R. 5 Q. B. 241, is distinguishable: all it decides is that if A. delivers B.'s goods to a railway company as A.'s own ordinary luggage, and the company receives them to be carried as such, B. cannot sue the company for the loss of the goods. Martin's case, however, was not cited.

(*n*) 19 C. B. N. S. 213; 34 L. J. C. P. 292 (1865). This case was not cited either in Martin *v.* G. I. P. R. Co. or Foulkes *v.* Met. Dist. R. Co.

which contract being made with the servant, no third person could found any right upon it. "The rights founded on contract belong to the person who has stipulated for them" (*o*); and it is denied that there was any duty independent of contract (*p*). But it is not explained in any of the judgments how this view is consistent with the authorities relied on for the plaintiff, and in particular with Marshall's case, a former decision of the same Court. The test question, whether the reception of the plaintiff's servant as a passenger would not have created a duty to carry him safely if there had not been any contract with him, is not directly, or, it is submitted, adequately dealt with. The case, though expressly treated by the Court as of general importance, has been but little cited or relied on during the twenty years that have now passed; and the correctness of the decision was disputed (extra-judicially, it is true) by Sir E. V. Williams (*q*). A directly contrary decision has also been given in the State of Massachusetts (*r*). [*447] Alton's case, moreover, * seems to be virtually overruled by Foulkes's case, which proceeds on the existence of a duty not only in form but in substance independent of contract. The only way of maintaining the authority of both decisions would be to say that in Alton's case the master could not recover because the servant had a contract with the defendant railway company, but might have been entitled to recover if the servant had been travelling with a free pass, or with a ticket taken and paid for by a stranger, or issued by another company, or had suffered from a fault in the permanent way or the structure of a station. But such a distinction does not appear reasonable.

It might perhaps have been argued that at all events such negligence must be shown as would make a carrier of passengers liable to a person being carried gratuitously; it might also be open to argument whether the

(*o*) Willes J., 19 C. B. N. S. at p. 240.

(*p*) Montague Smith J. at p. 245.

(*q*) "The Court decided this case on the principle that one who is no party to a contract cannot sue in respect of the breach of a duty arising out of the contract. But it may be doubted whether this was correct; for the duty, as appears by the series of cases cited in the earlier part of this note, does not exclusively arise out of the contract, but out of the common law obligation of the defendants as carriers:" 1 Wms. Saund. 474. Sir E. V. Williams was a member of the Court which decided Marshall's case, *supra*, p. 441.

(*r*) Ames *v.* Union R. Co. (1875) 117 Mass. 541, expressly following Marshall's ca. (1851) 11 C. B. 655; 21 L. J. C. P. 34; *supra*, p. 441.

person injured (apparently a commercial traveller) was really the servant of the plaintiff in such a sense that an action could be maintained for the loss of his service. Doubtless the action for wrong to a servant *per quod servitium amisit* is of an archaic character and not favoured in our modern law, and this may have unconsciously influenced the Court. Neither of these points however was discussed, nor indeed were they open to discussion upon the issues of law raised by the pleadings, on which alone the case was argued and decided. The questions what degree of negligence must be shown, whether a mere non feasance would be enough, or the like, could have been properly raised only when the evidence came out (*s*).

The most ingenious reason for the judgment of the Court is that of Willes J., who said that to allow such an * action would be to allow a stranger to exer- [* 448] cise and determine the election (of suing in contract or tort) which the law gives only to the person actually injured. But it is submitted that the latter is (or was) required to elect between the two causes of action as a matter of remedy, not of right, and because he is to be compensated once and once only for the same damage; and that such election neither affects nor is affected by the position of a third person. Moreover the master does not sue as a person claiming through the servant, but in a distinct right. The cause of action and the measure of damages are different (*t*). On the whole the weight of principle and authority seems to be so strong against Alton's case that, notwithstanding the respect due to the Court before which it came, and which included one of the greatest masters of the common law at any time, the only legitimate conclusion is that it was wrongly decided.

It must be admitted that the Court of Appeal itself has spoken with a somewhat ambiguous voice (*u*). We should be bound, however, to prefer the later or more considered decision even if it did not appear to be more in harmony with the general current of authorities.

It appears, then, that there is a certain tendency to hold that facts which constitute a contract cannot have

Winter bottom *v.* Wright, &c.

(*s*) Compare Mr. Henry T. Terry's criticism in "Leading Principles of Anglo-American Law," Philadelphia, 1884, pp. 485–488.

(*t*) See pp. 195, 196, above.

(*u*) The actual decision of Fleming's case (p. 438 above) is on a minute point of statutory procedure, but its grounds are not easy to reconcile with those of Foulkes's case.

any other legal effect. We think we have shown that such is not really the law, and we may add that the authorities commonly relied on for this proposition really prove something different and much more rational, namely that if A. breaks his contract with B. (which [* 449] may happen * without any personal default in A. or A.'s servants), that is not of itself sufficient to make A. liable to C., a stranger to the contract, for consequential damage. This, and only this, is the substance of the perfectly correct decisions of the Court of Exchequer in Winterbottom *v.* Wright (*x*) and Longmeid *v.* Holliday (*y*). In each case the defendant delivered, under a contract of sale or hiring, a chattel which was in fact unsafe to use, but in the one case was not alleged, in the other was alleged but not proved, to have been so to his knowledge. In each case a stranger to the contract, using the chattel—a coach in the one case, a lamp in the other—in the ordinary way, came to harm through its dangerous condition, and was held not to have any cause of action against the purveyor. Not in contract, for there was no contract between these parties; not in tort, for no bad faith or negligence on the defendant's part was proved. If bad faith (*z*) or misfeasance by want of ordinary care (*a*) had been shown, or, it may be, if the chattels in question had been of the class of eminently dangerous things which a man deals with at his peril (*b*), the result would have been different. With regard to the last-mentioned class of things the policy of the law has created a stringent and peculiar duty, to which the ordinary rule that the plaintiff must make out either wilful wrongdoing or negligence does not apply. There remain over some few miscellaneous cases currently cited on these topics, of which we have purposely said nothing because they are little or nothing more than warnings to pleaders (*c*).

(*x*) 10 M. & W. 109; 11 L. J. Ex. 415 (1842).

(*y*) 6 Ex. 761; 20 L. J. Ex. 430 (1851).

(*z*) Langridge *v.* Levy (1837) 2 M. & W. 519.

(*a*) George *v.* Skivington (1869) L. R. 5 Ex. 1.

(*b*) See Thomas *v.* Winchester (1852) 6 N. Y. 397; Bigelow L. C. 602; p. 411 above.

(*c*) Such is Collis *v.* Selden (1868) L. R. 3 C. P. 495, where the declaration attempted to make a man liable for creating a dangerous state of things, without any allegation that he knew of the danger, or had any control over the thing he worked upon or the place where it was, or that the plaintiff was anything more than a "bare licensee." Tollit *v.* Sherstone, 5 M. & W. 283, is another study in bad pleading which adds nothing to the substance

* If, after this examination of the authorities, [* 450] we cannot get rid of the notion that the concurrence of distinct causes of action *ex delicto* and *ex contractu* is a mere accident of common law procedure, we have only to turn to the Roman system and find the same thing occurring there. A freeborn *filius familias*, being an apprentice, is immoderately beaten by his master for clumsiness about his work. The apprentice's father may perhaps have an action against the master on the contract of hiring (*ex locato*), but he may certainly have an action under the *lex Aquilia*, since the excess in an act of correction which within reasonable bounds would have been lawful amounts to *culpa* (*d*). It is like the English cases we have cited where there was held to be a clear cause of action independent of contract, so that it was not necessary for the plaintiff to make out a breach of contract as between the defendant and himself.

Concurrence of breach of contract with delict in Roman law.

III.—*Causes of Action in Tort dependent on a Contract not between the same Parties.*

Causes of action dependent on collateral contract.

(a) When a binding promise is made, an obligation is created which remains in force until extinguished by the performance or discharge of the contract. Does the duty thus owed to the promisee constitute the object of a kind of real right which a stranger to the contract can infringe, * and thereby render himself answer- [* 451] able *ex delicto*? In other words, does a man's title to the performance of a promise contain an element analogous to ownership or possession? The general principles of the law (notwithstanding forms of speech once in use, and warranted by considerable authority) (*e*) seems to call for a negative answer. It would confuse every accustomed boundary between real and personal rights, dominion and obligation, to hold that one who without any ill-will to Peter prevents Andrew from performing his contract with Peter may be a kind

What did Lumley *v.* Gye decide?

of the law. So Howard *v.* Shepherd (1850) 9 C. B. 296, exhibits an attempt to disguise a manifestly defective cause of action in assumpsit by declaring in the general form of case.

(*d*) D. 9. 2. 5, § 3; Grueber on the Lex Aquilia, p. 14: the translation there given is not altogether correct, but the inaccuracies do not affect the law of the passage. And see D. *h. t.* 27, §§ 11, 33, Greuber, p. 230.

(*e*) Blackstone, ii. 442, speaks of a contract to pay a sum of money as transferring a property in that sum; but he forthwith adds that this property is "not in possession but in action merely," *i. e.* it is not property in a strict sense: there is a *res* but not a *dominus*, *Vermögen* but not *Eigenthum*.

of trespasser against Peter (*f*). For Peter has his remedy against Andrew, and never looked to having any other; and Andrew's motives for breaking his contract are not material. Yet there is some show of authority for affirming the proposition thus condemned. It was decided by the Court of Queen's Bench in Lumley *v.* Gye (1853) (*g*), and by the Court of Appeal in Bowen *v.* Hall (1881) (*h*), that an action lies, under certain conditions, for procuring a third person to break his contract with the plaintiff. We must therefore examine what the conditions of these cases were, and how far the rule laid down by them really extends.

Special damage

First, it is admitted that actual damage must be alleged and proved (*i*). This at once shows that the [* 452] right violated * is not an absolute and independent one like a right of property, for the possibility of a judgment for nominal damages is in our law the touchstone of such rights. Where specific damage is necessary to support an action, the right which has been infringed cannot be a right of property, though in some cases it may be incident to property.

and malice

Next, the defendant's act must be malicious, in the sense of being aimed at obtaining some advantage for himself at the plaintiff's expense, or at any rate at causing loss or damage to the plaintiff. In the decided cases the defendant's object was to withdraw from a rival in business, and procure for himself, the services of a peculiarly skilled person—in the earlier case an operatic singer, in the later a craftsman to whom, in common with only a few others, a particular process of manufacture was known. Various cases may be put of a man advising a friend, with all honesty and without ill-will to the other contracting party, to abide the risks of breaking an onerous or mischievous contract rather than those of performing it (*k*). And it would be un-

(*f*) We have no right to say that a system of law is not conceivable where such a doctrine would be natural or even necessary. But that system, if it did exist, would be not at all like the Roman law and not much like the common law.

(*g*) 2 E. & B. 216; 22 L. J. Q. B. 463; by Crompton, Erle, and Wightman JJ.; *diss.* Coleridge J.

(*h*) 6 Q. B. Div. 333; by Lord Selborne L. C. and Brett L. J.; *diss.* Lord Coleridge C. J.

(*i*) See the declaration in Lumley *v.* Gye. In Bowen *v.* Hall it does not appear how the claim for damages was framed, but in the opinion of the majority of the Court there was evidence of special damage; see 6 Q. B. D. 337.

(*k*) See the dissenting judgment of Sir John Coleridge in Lumley *v.* Gye.

reasonable in such cases to treat the giving of such advice, if it be acted on, as a wrong. Lucilia has imprudently accepted an offer of marriage from Titius, her inferior in birth, station and breeding: Lucilia's brother Marcus, knowing Titius to be a man of bad character, persuaded Lucilia to break off the match: shall any law founded in reason say that Marcus is liable to an action at the suit of Titius? Assuredly not: and there is no decision that authorizes any such proposition even by way of plausible extension. There must be a * wrongful intent to do harm to the plaintiff [* 453] are of the gist of the action. before the right of action for procuring a breach of contract can be established. Mere knowledge that there is a subsisting contract will not do. Only with these limitations can we safely say that a contract can or does "impose a duty, upon persons extraneous to the obligation, not to interfere with its due performance" (*l*). The breach of contract is in truth material only because it excludes the defence that the act complained of, though harmful and intended to do harm, was done in the exercise of a common right.

In this view the real point of difficulty is reduced to this, that the damage may be deemed too remote to found the action upon. For if A. persuades B. to break his contract with Z., the proximate cause of Z.'s damage, in one sense, is not the conduct of A. but the voluntary act or default of B. We do not think it can be denied that there was a period in the history of the law when this objection would have been held conclusive. Question of remoteness of damage.

Doubtless Lord Ellenborough laid it down as a general rule of law that a man is answerable only for "legal and natural consequence," not for "an illegal consequence," that is, a wrongful act of a third person (*m*). But this opinion is now disapproved (*n*).

The tendency of our later authorities is to measure responsibility for the consequences of an act by that which appeared or should have appeared to the actor as natural and probable, and not to lay down fixed rules which may run counter to the obvious facts. Here the consequence is not only natural and probable—if A.'s action has any * consequence at all—but is [* 454] designed by A.: it would therefore be contrary to the facts

(*l*) Anson, English Law of Contract, 204.
(*m*) Vicars *v.* Wilcocks (1807) 8 East 1, and in 2 Sm. L. C.
(*n*) See Lynch *v.* Knight (1861) 9 H. L. C. 577, and notes to Vicars *v.* Wilcocks in Sm. L. C.

to hold that the interposition of B.'s voluntary agency necessarily breaks the chain of proximate cause and probable consequence. A proximate cause need not be an immediate cause.

Liability for negligence, as we have seen (*o*), is not always or necessarily excluded by what is called "contributory negligence of a third person." In any case it would be strange if it lay in a man's mouth to say that the consequence which he deliberately planned and procured is too remote for the law to treat as a consequence. The iniquity of such a defence is obvious in the grosser examples of the criminal law. Commanding, procuring, or inciting to a murder cannot have any "legal consequence, the act of compliance or obedience being a crime; but no one has suggested on this ground any doubt that the procurement is also a crime.

Motive as an ingredient in the wrong.

It may likewise be said that the general habit of the law is not to regard motive as distinguished from intent and that the decision in Lumley *v.* Gye, as here understood and limited is therefore anomalous at best. Now the general habit is as stated, but there are well established exceptions to it, of which the action for malicious prosecution is the most conspicuous: there it is clear law that indirect and improper motive must be added to the other conditions to complete the cause of action. The malicious procuring of a breach of contract, or of certain kinds of contracts, forms one more exception. It may be that the special damage which is the ground of the action must be such as cannot be redressed in an action for the breach of contract itself; [* 455] in other words, * that the contract must be for personal services, or otherwise of such a kind that an action against the contracting party would not afford an adequate remedy. But then the remedy against the wrong-doer will not be adequate either; so that there does not appear to be much rational ground for this limitation. The obvious historical connexion with the action for enticing away a servant will not help to fix the modern principle. Coleridge J. rightly saw that there was no choice between facing the broader issues now indicated and refusing altogether to allow that any cause of action appeared.

American doctrine.

In America the decision in Lumley *v.* Gye has been

(*o*) P. 391 above.

followed in Massachusetts (*p*), and elsewhere, and is generally accepted, with some such limitation as here maintained. The rule "does not apply to a case of interference by way of friendly advice, honestly given; nor is it in denial of the right of free expression of opinion" (*q*).

(**b**) Procuring a breach of contract, then, may be actionable if maliciously done; or a contracting party may indirectly through the contract, though not upon it, have an action against a stranger. Can he become liable to a stranger? We have already seen that a misfeasance by a contracting party in the performance of his contract may be an independent wrong as against a stranger to the contract, and as such may give that stranger a right * of action (*r*). On the other hand a [* 456] breach of contract, as such, will generally not be a cause of action for a stranger (*s*). And on this principle it is held by our courts that where a message is incorrectly transmitted by the servants of a telegraph company, and the person to whom it is delivered thereby sustains damage, that person has not any remedy against the company. For the duty to transmit and deliver the message arises wholly out of the contract with the sender, and there is no duty towards the receiver. Wilful alteration of a message might be the ground for an action for deceit against the person who altered it, as he would have knowingly made a false statement as to the contents of the message which passed through his hands. But a mere mistake in reading off or transmitting a letter or figure, though it may materially affect the sense of the despatch cannot be treated as a deceit (*t*).

Damage to stranger by breach of contract.

"In America, on the other hand, one who receives a telegram which, owing to the negligence of the

Position of receiver of

(*p*) Walker *v.* Cronin (1871) 107 Mass. 555, a case very like Bowen *v.* Hall.

(*q*) 107 Mass. 566. I owe the following additional references to State reports to the kindness of an American friend:—Riee *v.* Manley, 66 N. Y. (21 Sickels) 82; Benton *v.* Pratt, 2 Wend. 385 (see p. 261 above); Jones *v.* Blocker, 43 Ga. 331; Haskin *v.* Royster, 70 N. C. 601; Jones *v.* Starly, 76 N. C. 355; Dickson *v.* Dickson, La. An. 1261; Burger *v.* Carpenter, 2 S. C. 7.

(*r*) P. 445 above.

(*s*) The exceptions to this rule are much wider in America than in England.

(*t*) Dickson *v.* Reuter's Telegram Co. (1877) 3 C. P. Div. 1, confirming Playford *v.* U. K. Electric Telegraph Co. (1869) L. R. 4 Q. B. 706.

erroneous telegram: different views in England and U. S.

telegraph company, is altered or in other respects untrue, is invariably permitted to maintain an action against the telegraph company for the loss that he sustains through acting upon that telegram:" the latest commentator on the American authorities, however, finds the reasoning of the English Courts difficult to [* 457] answer (*u*). And the American * decisions appear to rest more on a strong sense of public expediency than on any one definite legal theory. The suggestion that there is something like a bailment of the message may be at once dismissed. Having regard to the extension of the action for deceit in certain English cases (*x*), there is perhaps more to be said for the theory of misrepresentation than our courts have admitted; but this too is precarious ground. The real question of principle is whether a general duty of using adequate care can be made out. I am not bound to undertake telegraphic business at all; but if I do, am I not bound to know that errors in the transmission of messages may naturally and probably damnify the receivers? and am I not therefore bound, whether I am forwarding the messages under any contract or not, to use reasonable care to ensure correctness? I cannot warrant the authenticity or the material truth of the despatch, but shall I not be diligent in that which lies within my power, namely the delivery to the receiver of those words or figures which the sender intended him to receive? If the affirmative answer be right, the receiver who is misled many have a cause of action, namely for negligence in the execution of a voluntary undertaking attended with obvious risk. But a negative answer is given by our own courts, on the ground that the ordinary law of negligence has never been held to extend to negligence in the statement of facts (if it did, there would be no need of special rules as to deceit); and that the delivery of a message, whether by telegraph or otherwise, is nothing but a statement that certain words have been communicated by the sender to the messenger for the purpose of being by him com

(*u*) Gray on Communication by Telegraph (Boston, 1885) §§ 71–73, where authorities are collected. And see Wharton on Contracts, §§ 791, 1056, who defends the American rule on somewhat novel speculative grounds. Perhaps the common law ought to have a theory of *culpa in contrahendo*, but Dr. Wharton's ingenuity will not persuade many common lawyers that it has. And if it had, I fail to see how that could affect the position of parties between whom there is not even the offer of a contract.

(*x*) See especially Denton *v.* G. N. R. Co. (1856) 5 E. & B. 860; 25 L. J. Q. B. 129, p. 250 above.

municated to the receiver. * It may perhaps [* 458] be said against this that the nature of telegraph business creates a special duty of diligence in correct statement, like that of a trustee with regard to incumbrances on the trust fund (*y*); so that an action as for deceit will lie without actual fraud. But it would be better to say that the systematic undertaking to deliver messages in a certain way (much more the existence of a corporation for that special purpose) puts the case in a category of its own apart from representations of fact made in the common intercourse of life, or the repetition of any such representation. Thus we should come back to the old ground of the action on the case for misfeasance. The telegraph company would be in the same plight as the smith who pricks a horse with a nail, or the unskilful surgeon, and liable without any question of contract or warranty. Such liability would not necessarily be towards the receiver only, though damage incurred by any other person would in most cases be too remote. The Court of Appeal has for the present disposed of the matter for this country, and inland communication by telegraph is now in the hands of the Postmaster-General, who could not be sued even if the American doctrine were adopted. With regard to foreign telegrams, however, the rule is still of importance, and until the House of Lords has spoken it is still open to discussion.

The conflict considered on principle.

In the present writer's opinion the American decisions, though not all the reasons given for them, are on principle correct. The undertaking to transmit a sequence of letters or figure (which may compose significant words and sentences, but also may be, and often are, mere unintelligible symbols to the transmitter) is a wholly different thing from the statement of an alleged fact or the expression of * a professed opinion in one's own language. [* 459] Generally speaking, there is no such thing as liability for negligence in word as distinguished from act; and this difference is founded in the nature of the thing (*z*). If a man asserts as true that which he does not believe to be true, that is deceit; and this includes, as we have

(*y*) Burrowes *v.* Lock, 10 Ves. 470, *supra*, p. 167.

(*z*) The law of defamation stands apart: but it is no exception to the proposition in the text, for it is not a law requiring care and caution in greater or less degree, but a law of absolute responsibility qualified by absolute exceptions; and where malice has to be proved, the grossest negligence is only evidence of malice.

seen, making assertions as of his own knowledge about things of which he is ignorant. If he only speaks, and purports to speak, according to his information and belief, then he speaks for his own part both honestly and truly, though this information and belief may be in themselves erroneous, and though if he had taken ordinary pains his information might have been better. If he expresses an opinion, that is his opinion for what it is worth, and others must estimate its worth for themselves. In either case, in the absence of a special duty to give correct information or a competent opinion, there is no question of wrong-doing. If the speaker has not come under any such duty, he was not bound to have any information or to frame any opinion. But where a particular duty has been assumed, it makes no difference that the speaking or writing of a form of words is an incident in the performance. If a medical practitioner miscopies a formula from a pharmacopœia or medical treatise, and his patient is poisoned by the druggist making it up as so copied, surely that is actionable negligence, and actionable apart from any contract. Yet his intention was only to repeat what he found in the book. It is true that the prescription, even if he states it to be taken out of the book, is his prescription, and [* 460] he is * answerable for its being a fit one; if it be exactly copied from a current book of good repute which states it to be applicable to such cases as the one in hand, that will be evidence, but only evidence, that the advice was competent.

Again the negligent misreading of an ancient record by a professed palæographist might well be a direct and natural cause of damage; if such a person, being employed under a contract with a solicitor, made a negligent mistake to the prejudice of the ultimate client, is it clear that the client might not have an action against him? If not, he may with impunity be negligent to the verge of fraud; for the solicitor, not being damnified, would have no cause of action, or at most a right to nominal damages on the contract. The telegraph clerk's case is more like one of these (we do not say they are precisely analogous) than the mere reporting or repetition of supposed facts. There remains, no doubt, the argument that liability must not be indefinitely extended. But no one has proposed to abolish the general rule as to remoteness of damage, of which the importance, it is submitted, is apt to be obscured by contriving hard and fast rules in order to limit the possible combinations of the elements of liability. Thus it seems

that even on the American view damages could not be recovered for loss arising out of an error in a ciphered telegram, for the telegraph company would have no notice of what the natural and probable consequences of error would be (*a*).

Uncertainty still remaining in English doctrine.

Taking together all the matters hitherto discussed in this chapter, it appears that different views and tendencies have on different occasions prevailed even in the same court, and that we are not yet in possession of a complete and * consistent doctrine. Fleming's case (*b*) [* 461] is reconcilable, but only just reconcilable, with Foulkes's case (*c*) and Dickson *v.* Reuter's Telegram Co. (*d*), though not directly opposed to Bowen *v.* Hall (*e*), is certainly not conceived in the same spirit.

Character of morally innocent acts affected by extraneous contract.

(C) There are likewise cases where an innocent and even a prudent person will find himself within his right, or a wrong-doer, according as there has or has not been a contract between other parties under which the property or lawful possession of goods has been transferred. If a man fraudulently acquires property in goods, or gets delivery of possession with the consent of the true owner, he has a real though a defeasible title, and at any time before the contract is avoided (be it of sale or any form of bailment) he can give an indefeasible title by delivery over to a buyer or lender for valuable consideration given in good faith (*f*). On the other hand a man may obtain the actual control and apparent dominion of goods not only without having acquired the property, but without any rightful transfer of possession. He may obtain possession by a mere trick, for example by pretending to be another person with whom the other party really intends to deal (*g*), or the agent of that person (*h*). In such a case a third person, even if he has no means of knowing the actual possessor's want of title, cannot acquire a good title from him unless the sale is in market overt, or the transaction is within some special statutory protection, as that of the Factors Acts. He deals, however in-

(*a*) Cp. Sanders *v.* Stuart (1876) 1 C. P. D. 326.
(*b*) 4 Q. B. Div. 81.
(*c*) 5 C. P. Div. 157.
(*d*) 3 C. P. Div. 1.
(*e*) 6 Q. B. Div. 333.
(*f*) See the principle explained, and worked out in relation to complicated facts, in Pease *v.* Gloahec, L. R. 1 P. C. 219.
(*g*) Cundy *v.* Lindsay, 3 App. Ca. 459.
(*h*) Hardman *v.* Booth, 1 H. & C. 803; 32 L. J. Ex. 105.

[* 462] nocently, at his peril. In these cases * there may be hardship, but there is nothing anomalous. It is not really a contract between other parties that determines whether a legal wrong has been committed or not, but the existence or non existence of rights of property and possession—rights available against all the world—which in their turn exist or not according as there has been a contract, though perhaps vitiated by fraud as between the original parties, or a fraudulent obtaining of possession (*f*) without any contract. The question is purely of the distribution of real rights as affording occasion for their infringement, it may be an unconscious infringement. A man cannot be liable to A. for meddling with A.'s goods while there is an unsettled question whether the goods are A.'s or B.'s. But it cannot be a proposition in the law of torts that the goods are A.'s or B.'s, and it can be said to be, in a qualified sense, a proposition in the law of contract only because in the common law property and the right to possession can on the one hand be transferred by contract without delivery or any other overt act, and on the other hand the legal effect of a manual delivery or consignment may depend on the presence or absence of a true consent to the apparent purpose and effect of the act. The contract, or the absence of a contract, is only part of the incidents determining the legal situation on which the alleged tortious act operates. There are two questions, always conceivably and often practically distinct: Were the goods in question the goods of the plaintiff? Did the act complained of amount to a trespass or conversion? Both must be distinctly answered [* 463] *in the affirmative to make out the plaintiff's claim, and they depend on quite different principles (*g*). There is therefore no complication of contract and tort in these cases, but only—if we may so call it—a dramatic juxtaposition.

IV.—*Measure of Damages and other Incidents of the Remedy.*

Measure of damages, &c.

With regard to the measure of damages, the same

(*f*) It will be remembered that the essence of trespass *de bonis asportatis* is depriving the true owner of possession: a thief has possession in law, though a wrongful possession, and the lawful possessor of goods cannot at common law steal them, except in the cases of "breaking bulk" and the like, where it is held that the fraudulent dealing determines the bailment.

(*g*) See *passim* in the opinions delivered in Hollins *v.* Fowler, L. R. 7 H. L. 757.

principles are to a great extent applicable to cases of contract and of tort, and even rules which are generally peculiar to one branch of the law may be applied to the other in exceptional classes of cases.

The liability of a wrong-doer for his act is determined, as we have seen, by the extent to which the harm suffered by the plaintiff was a natural and probable consequence of the act. It seems on the whole that this is also the true measure of liability for breach of contract; the judgment of what is natural and probable being taken as it would have been formed by a reasonable man in the defendant's place at the date of the wrongful act, or the conclusion of the contract, as the case may be. No doubt there have been in the law of contract quite recent opinions of considerable authority casting doubt on the rule of Hadley *v.* Baxendale (*h*), and tending to show that a contracting party can be held answerable for special consequences of a breach of his contract only if there has been something amounting to an undertaking on his part to bear such consequences; on this view even express notice of the probable consequences—if they be not in themselves of a common and obvious kind, such as the plaintiff's loss of a difference between the contract and the market price of * marketable goods which the defend- [* 464] ant fails to deliver—would not of itself suffice (*i*).

Rules as to consequential damages: how far alike in contract and tort.

But the Court of Appeal has more lately disapproved this view, pointing out that a contracting party's liability to pay damages for a breach is not created by his agreement to be liable, but is imposed by law. "A person contemplates the performance and not the breach of his contract; he does not enter into a kind of second contract to pay damages, but he is liable to make good those injuries which he is aware that his default may occasion to the contractee" (*k*).

The general principle, therefore, appears to be the same in contract as in tort, whatever difficulty may be

---

(*h*) 9 Ex. 341; 23 L. J. Ex. 179 (1854).

(*i*) Horne *v.* Midland R. Co. (1873) Ex. Ch., L. R. 8 C. P. 131.

(*k*) Hydraulic Engineering Co. *v.* McHaffie (1878) 4 Q. B. Div. 670, per Bramwell L. J. at p. 674; Brett and Cotton L.JJ. are no less explicit. The time to be looked to is that of entering into the contract: *ib.* In McMahon *v.* Field (1881) 7 Q. B. Div. 591, the supposed necessity of a special undertaking is not put forward at all. Mr. J. D. Mayne, though he still (4th ed. 1884) holds by Horne *v.* Midland R. Co., very pertinently asks where is the consideration for such an undertaking.

found in working it out in a wholly satisfactory manner in relation to the various combinations of facts occurring in practice (*l*).

One point may be suggested as needful to be borne in mind to give a consistent doctrine. Strictly speaking, it is not notice of apprehended consequences that is material, but notice of the existing facts by reason whereof those consequences will naturally and probably ensue upon a breach of the contract (*m*).

Vindictive character of action for breach of promise of marriage.

[* 465] * Exemplary or vindictive damages, as a rule, cannot be recovered in an action on a contract, and it makes no difference that the breach of contract is a misfeasance capable of being treated as a wrong. Actions for breach of promise of marriage are an exception, perhaps in law, certainly in fact: it is impossible to analyse the estimate formed by a jury in such a case, or to prevent them from giving, if so minded, damages which in truth are, and are intended to be, exemplary (*n*). Strictly the damages are by way of compensation, but they are "almost always considered by the jury somewhat *in poenam*" (*o*). Like results might conceivably follow in the case of other breaches of contract accompanied with circumstances of wanton injury or contumely.

Contracts on which executors cannot sue.

In another respect breach of promise of marriage is like a tort: executors cannot sue for it without proof of special damage to their testator's personal estate. "Executor and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record; otherwise the Court cannot intend it" (*p*). The same rule appears to hold as concerning injuries to the person caused by unskil-

---

(*l*) As to the treatment of consequential damage where a false statement is made which may be treated either as a deceit or as a broken warranty, see Smith *v.* Green (1875) 1 C. P. D. 92.

(*m*) According to Alderson B. in Hadley *v.* Baxendale, it is the knowledge of "special circumstances under which the contract was actually made" that has to be looked to, *i. e.* the probability of the consequence is only matter of inference.

(*n*) See Berry *v.* Da Costa (1866) L. R. 1 C. P. 331.

(*o*) Le Blanc J. in Chamberlain *v.* Williamson (1814) 2 M. & S. 408, 414.

(*p*) Chamberlain *v.* Williamson, 2 M. & S. at p. 115.

ful medical treatment, negligence of carriers of passengers or their servants, and the like, although the duty to be performed was under a contract (*q*). Positive authority, however, has not been found * on the [* 466] extent of this analogy. The language used by the Court of King's Bench is at any rate not convincing, for although certainly a wrong is not property, the right to recover damages for a wrong is a chose in action; neither can the distinction between liquidated and unliquidated damages afford a test, for that would exclude causes of action on which executors have always been able to sue. We have considered in an earlier chapter the exceptional converse cases in which by statute or otherwise a cause of action for a tort which a person might have sued on in his lifetime survives to his personal representatives.

Where there was one cause of action with an option to sue in tort or in contract, the incidents of the remedy generally were determined once for all, under the old common law practice, by the plaintiff's election of his form of action. But this has long ceased to be of practical importance in England, and, it is believed, in most jurisdictions.

(*q*) *Ibid.*: Willes J. in Alton *v.* Midland R. Co. 19 C. B. N. S. at p. 242; 34 L. J. C. P. at p. 298; cp. Beckham *v.* Drake (1841) 8 M. & W. at p. 854; 1 Wms. Saund. 242; and see more in Williams on Executors, pt. 2, bk. 3, ch. 1, § 1; and Raymond *v.* Fitch (1835) 2 C. M. & R. 588.

*APPENDIX A. [*467]

HISTORICAL NOTE ON THE CLASSIFICATION OF THE FORMS OF PERSONAL ACTION.

(By Mr. F. W. Maitland.)

The history of the attempt to classify the English personal actions under the two heads of Contract and Tort will hardly be understood unless two preliminary considerations are had in mind.

(1.) Between the various forms of action there were in old time many procedural differences of serious practical importance. Some of these would have been brought out by such questions as the following:—

(a) What is the mesne process proper to this action? Does one begin with summons or with attachment? Is there a *capias ad respondendum*, or again, is there land to be seized into the king's hand?

(b) What is the general issue? Is it *e. g.*, *Nil debet*, or *Non assumpsit*, or *Not guilty?*

(c) What mode of proof is open to the defendant? Is this one of the actions in which he can still wage his law?

(d) What is the final process? Can one proceed to outlawry?

(e) How will the defendant be punished if the case goes against him? Will he be merely amerced or will he be imprisoned until he makes fine with the king?

In course of time, partly by statutes, partly under cover of fictions, the procedure in the various personal actions was made more uniform; but the memory of these old differences endured, and therefore classification was a difficult task.

(2) The list of original writs was not the reasoned scheme of a provident legislator calmly devising apt remedies for all conceivable wrongs; rather it was the outcome of the long, and not always * bloodless, struggle whereby [*468] the English king at various times and under various pretexts drew into his own court (and so drew away from other courts communal, seignorial, ecclesiastical), almost all the litigation of the realm. Then, in the thirteenth century, the growth of Parliament prevented for the future any facile invention of new remedies. To restrain the king's writ-making power had been a main object with those who strove for Parliaments (*a*). The completeness of the parliamentary victory is marked by the well-known clause in the Statute of Westminster II. (*b*) which allows the Chancery to vary the old forms so as to suit

(*a*) See a complaint by the bishops in 1257, Mat. Par. Chron. Maj. (ed. Luard) vol. vi. p. 363. New writs contrary to law are made in the Chancery without the consent of the council of the realm. So under the provisions of Oxford (1258) the Chancellor is to swear that he will seal no writs save writs of course, without the order of the king and of the council established by the provisions. See Stubbs, Select Charters, Part 6, No. 4.

(*b*) Stat. 13 Edw. 1 (1285) c. 24.

new cases, but only new cases which fall under old law. A use of this permission, which we are apt to think a tardy and over-cautious use, but which may well have been all that Parliament would have suffered, gave us in course of time one new form of action, namely, trespass upon the special case, and this again threw out branches which came to be considered as distinct forms of action, namely assumpsit and trover. Equity, again, met some of the new wants of new times, but others had to be met by a stretching and twisting of the old forms which were made to serve many purposes for which they were not originally intended.

Now to Bracton writing in the middle of the thirteenth century, while the king in his chancery and his court still exercised a considerable power of making and sanctioning new writs (*c*), it may have seemed very possible that the personal actions might be neatly fitted into the scheme that he found provided in the Roman books; they must be (1) *ex contractu vel quasi* (2) *ex maleficio vel quasi* (*d*). Personal actions in the king's court were by no means very common; such actions still went to the local courts. Perhaps it is for this reason that he says very little about them; perhaps his work is unfinished; at any rate, he just states this classification but makes hardly any use of it. The same may be said of his epitomators Britton (*e*) and Fleta (*f*). Throughout the middle ages [* 469] * the theory that personal actions may be arranged under these headings seems to remain a sterile, alien theory. It does not determine the arrangement of the practical books, of the Register, the Old Natura Brevium, Fitzherbert's Natura Brevium, the Novae Narrationes. Even Hale, when in his Analysis he mapped out the field of English law, did not make it an important outline.

The truth seems to be that the most natural classification of writs was quite different. It would give us as its two main headings—(a) *Praecipe;* (b) *Si te fecerit securum.*

(**a**) In one class we have writs beginning with *Praecipe quod reddat—faciat—permittat.* The sheriff is to bid the defendant render (do, permit) something, and only if this command be ineffectual will the action proceed. To this class belong the writ of right and other proprietary real actions, also debt (*g*), detinue, account and covenant.

(**b**) In the other class the writ supposes that there is already a completed wrong and a perfect cause of action in the king's court. If the plaintiff finds pledges to prosecute, then the defendant must appear and answer. To this class belong the possessory assizes, trespass and all the forms developed out of trespass, viz. case, assumpsit, trover.

Much is made of this classification in a book which once was of good repute, a book to which Blackstone owed a good deal, Sir Henry Finch's Discourse on Law (*h*) The historical basis seems this : the king's own court takes cognizance of a cause either because the king's lawful precept has been disobeyed, or because the king's peace has been broken.

But in order to assure ourselves that the line between breaches of contractual obligation and other causes of action cannot have been regarded as an elementary outline of the law by our mediæval lawyers, we have only to recall

---

(*c*) His doctrine as to the making of new writs will be found on fols. 413—414 *b*. See fol. 438 *b* for a writ invented by William of Raleigh. In several other cases Bracton notices that the writ has been lately devised by resolution of the Court (*de consilio curiae*), *e. g.* the Quare Ejecit, fol. 220.

(*d*) Fol. 102.

(*e*) Vol. i. p. 156. Britton's equivalent for *maleficium* is *trespass.*

(*f*) Fol. 120.

(*g*) The writ of debt in Glanville, lib. 10, cap. 2, is just the writ of right with the variation that a certain sum of money due is substituted for a certain quantity of land. There may be trial by battle in Debt; see lib. 10, cap 5.

(*h*) Editions in 1613, 1636, 1678, and 1759. In the last of these see pp. 257, 261, 284, 296. Blackstone notices this classification in Comment. vol. iii. p. 274.

the history of assumpsit. We are obliged to say either that at some moment assumpsit ceased to be an action *ex maleficio* and became an action *ex contractu*, or (and this seems historically the better way of putting it) that it was an action founded not on contract, but on the tort done by breach of some contractual or other duty voluntarily assumed. It must have been difficult to hold that the forms of personal action could be aptly distributed between tort and contract, when in the Register * actions founded on non-performance [* 470] of an assumpsit occurred, not even under the title of Case (for there was no such title) but under the title of Trespass mixed up with assaults and asportations, far away from debt and covenant (*i*).

The same point may be illustrated by the difficulty which has been felt in modern times of deciding whether detinue was *ex contractu* or *ex delicto*. Bracton, fixing our terminology for all time, had said (*k*) that there was no *actio in rem* for the recovery of movables because the judgment gave the defendant the option of paying the value instead of delivering the chattel. The dilemma therefore of contract or tort was offered to claims to which, according to Roman notions, it was inapplicable. But whether detinue was founded on contract or founded on tort, was often debated and never well settled. During the last and the earlier part of the present century the fact that in detinue one might declare on a loss and finding (detinue sur trover) was taken to prove that there was not necessarily any contract between the parties (*l*). Opinion was swayed to the other side by the close relation between detinue and debt (*m*), a relation so close as to be almost that of identity especially when debt was brought, not in the *debit* and *detinet*, but in the *detinet* only (*n*). A middle opinion was offered by the learned Serjeant Manning (*o*) that detinue sur bailment was *ex contractu*, and detinue sur trover was *ex delicto*: this would have allowed the question to turn on the choice made by the plaintiff's pleader between two untraversable fictions. A recent decision of the Court of Appeal, (*p*) shows that the difficulty cannot occur in its old form. We are no longer, even if once we were compelled to say that the claim for delivery of a chattel is always *ex contractu* or always *ex delicto*, though the theory that every such claim is either *ex contractu* or *ex delicto* has difficulties of its own, which might have been avoided were we free to say that such a claim may be *actio in rem*.

Because of the wager of law assumpsit supplanted debt; so also * for [* 471] a long while the work of detinue was done by trover. That trover was in form *ex delicto* seems not to have been doubted, still it often had to serve the purpose of a *vindicatio*. As Lord Mansfield said (*q*), "Trover is in form a tort, but in substance an action to try property. . . . An action of trover is not now *ex maleficio*, though it is so in form; but it is founded on property."

For these among other reasons the attempt to force the English forms into the Roman scheme was not likely to prosper. Nevertheless the theory that the personal actions can be grouped under contract and tort made way as the procedural differences between the various forms were, in one way and another,

---

(*i*) Registrum, fol. 109 *b*; writs for not cutting down trees and not erecting a stone cross as promised, are followed immediately by a writ for entering a warren and carrying off goods by force and arms.

(*k*) Fol. 102 *b*.

(*l*) Kettle *v.* Bromsall (1738) Willes 118; Mills *v.* Graham (1804) 1 B. & P. N. R. 140; Gledstane *v.* Hewitt (1831) 1 Tyr. 445; Broadbent *v.* Ledward (1839) 11 A. & E. 209; Clements *v.* Flight (1846) 16 M. & W. 42.

(*m*) Walker *v.* Needham (1841) 4 Sc. N. R. 222; 3 Man. & Gr. 557; Danby *v.* Lamb (1861) 11 C. B. N. S. 423.

(*n*) "And indeed a writ of debt in the detinet only, is neither more nor less than a mere writ of detinue." Blackst. Comm. iii. 156.

(*o*) 3 Man. & Gr. 561, note.

(*p*) Bryant *v.* Herbert (1878) 3 C. P. Div. 389, reversing *S. C. ibid.* 189.

(*q*) Hambly *v.* Trott (1776) 1 Cowp. 371, 373, 374.

obliterated. Blackstone states the theory (*r*), but does not work it into detail; following the plan which he inherited from Hale, he treats debt, covenant and assumpsit as remedies for injuries affecting property, injuries affecting choses in action (*s*). In later books of practice the various forms are enumerated under the two headings; detinue appears sometimes on one side of the line, sometimes on the other (*t*).

Apart from the statutes which will be mentioned presently, little of practical importance has really depended on the drawing of this line. The classification of the personal actions has been discussed by the Courts chiefly in three contexts.

1. As to the joinder of actions. We find it said at a comparatively early day that "causes upon contract which are in the right and causes upon a tort cannot be joined" (*u*). But the rules regulating this matter were complicated, and could not be reduced to this simple principle. In the main they turned upon those procedural differences which have been noticed above. Thus it was said that the actions to be joined must be such as have the same mesne process and the same general issue, also that an action in which, apart from statute (*x*), the defendant was liable to fine, could not be joined with one in which he could only be amerced. Assumpsit could not be joined with debt; on the other hand [*472] debt * could be joined with detinue (*y*). This matter once very fertile of disputes has become altogether obsolete.

2. As to the survival of actions (a) against and (b) for personal representatives. Here again it may be doubted whether the line of practical importance has ever been that between contract and tort, though the latter has often been mentioned in this context.

(**a**) If we look back far enough we find that it was only by slow degrees that the executor came to represent the testator in at all a general way (*z*). It was, for instance, a rule that the executor could not be sued in debt if the testator could have waged his law. At one time and before the development of assumpsit, this must have meant that the executor could hardly ever be sued for money due upon a simple contract. In Coke's day it was still arguable that assumpsit would not lie against the executor (*a*), and not until the contrary had been decided was it possible to regard the executor as bearing in a general way the contractual liabilities of the testator. On the other hand it seems to have been quite as early established that the executor could be made to answer for some causes of action which were not breaches of contract, *i. e.*, where the estate had been increased by the proceeds of the testator's wrong-doing (*b*). But so long as the forms of action existed they were here of importance. Thus the executor could not have been sued in trespass or trover though the facts of the

(*r*) "Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and likewise whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs." Comm. iii. 117.

(*s*) *Ibid.* 153.

(*t*) Thus in Tidd's Practice (chap. i.) detinue is treated as *ex delicto;* in Chitty's Pleading (chap. ii.) it is classed as *ex contractu*, but hesitatingly.

(*u*) Denison *v.* Ralphson (1682) 1 Vent. 365, 366.

(*x*) 5 & 6 W. & M. c. 12, abolishing the *capiatur pro fine.*

(*y*) The learning on this topic will be found in the notes to Coryton *v.* Lithebye, 2 Wms. Saund. 117 *d.* See also the observations of Bramwell L. J. in Bryant *v.* Herbert, 3 C. P. Div. 389–391.

(*z*) See Bracton, fol. 407 *b.*

(*a*) Pinchon's Case (1611) 9 Rep. 86 *b.* By this time the province within which wager of law was permitted had been so much narrowed by judicial decision that it had become possible to regard as merely procedural the rule as to debt against executors stated above.

(*b*) Sir Henry Sherrington's Case (temp. Eliz.) Sav. 40. See remarks on this case and generally on this piece of history by Bowen L. J. in Phillips *v.* Homfray, 24 Ch. Div. 439, 457.

case were such that he could have been sued in assumpsit for money had and received (*c*). Trespass, it may be remembered, had but very gradually become a purely civil action; to start with it was at least in part a criminal proceeding: so late as 1694 the defendant was, in theory, liable to fine and imprisonment (*d*); criminal *proceedings founded on the testator's misconduct could [* 473] not be taken against the executor.

(b) As regards the other question, what actions survive for an executor or administrator, we find it early said that at common law actions in contract do survive while actions in tort do not (*e*); but already in 1330 a statute, which was very liberally construed, had given the executor some actions which undoubtedly were the outcome of tort (*f*). On the other hand it has been held even in the present century that (apart from all question as to real estate) an action for breach of contract does not necessarily survive for the personal representative; it was held that an administrator could not sue for a breach of promise to marry the intestate, that breach not having diminished the estate (*g*). The present state of the law as to the survival of actions is discussed above (*h*).

3. Several discussions as to the line between contract and tort were occasioned by the rule that while joint contractors must be sued jointly the liability of joint tort-feasors is joint and several (*i*). The earliest authority draws the distinction between "praecipe quod reddat" and debt on the one hand, and "trespass et huiusmodi" on the other (*k*). But the antithesis of contract and tort crops up in the seventeenth century (*l*). A decision (*m*) of Lord Mansfield in 1770, that the objection to non-rejoinder of all joint contractors as defendants can only be taken by plea in abatement deprived this matter of much of its importance. Still the question whether there has been a breach of a joint contract or a tort for which several are liable severally as well as jointly, is of course a question which may still arise and be difficult to answer (*n*).

Lastly we come to the statutory adoption of the theory that every personal action must be founded either upon contract or upon tort. The first statute which recognized this doctrine was seemingly the County Courts Act, 1846 (*o*). Here, in a section dealing with costs, the antithesis is "founded on contract," "founded on tort." The County Courts Act of 1850 (*p*) fell back on an enumeration of the forms of action, placing covenant, debt, detinue and assumpsit in one class, and trespass, trover and case in another class. The * Common Law Procedure Act, 1852 (*q*), assumes in its schedule of [* 474] forms that actions are either "on contracts," or "for wrongs independent of contract;" but sect. 74 admits that "certain causes of action may be considered to partake of the character both of breaches of contract and of wrongs;"

(*c*) Hambly *v.* Trott, 1 Cowper 371; Phillips *v.* Homfray, *ubi sup.*

(*d*) Stat. 5 & 6 W. & M. c. 12. The penal character of the writ of trespass is well shown by the clause of the Statutum Walliae introducing that writ into Wales. "Justitiarius . . . . si invenerit reum culpabilem, castiget eum per prisonam vel per redemptionem vel per misericordiam, et per dampna laeso restituenda secundum qualitatem et quantitatem delicti, ita quod castigatio illa sit aliis in exemplum, et timorem praebeat delinquendi."

(*e*) Le Mason *v.* Dixon (1627) W. Jones, 173.

(*f*) Stat. 4 Edw. 3, c. 7. De bonis asportatis in vita testatoris.

(*g*) Chamberlain *v.* Williamson (1814) 2 M. &. S. 408.

(*h*) P. 56.

(*i*) See notes to Cahell *v.* Vaughan, 1 Wms. Saund. 291.

(*k*) Br. Abr. *Responder*, 54.

(*l*) Bosen *v.* Sandford, 3 Salk. 203; 1 Shower 101; Rich *v.* Pilkington, Carth. 171; Child *v.* Sands, Carth. 294; Bastard *v.* Hancock, Carth. 361.

(*m*) Rice *v.* Shute, 5 Burr. 2611.

(*n*) See remarks of Lindley L. J. Partnership, 4th ed. vol. i. p. 373.

(*o*) 9 & 10 Vict. c. 95, s. 129.

(*p*) 13 & 14 Vict. c. 61, s. 11.

(*q*) 15 & 16 Vict. c. 76.

some very needless litigation might have been saved had a similar admission been made in other statutes.

By the County Courts Act of 1856 (*r*), costs in a certain event were made to depend upon the question whether the action was "an action of contract." By the Common Law Procedure Act of 1860 (*s*), costs in a certain event were made to depend on the question whether the action was "for an alleged wrong."

Lastly a section, which is still in force, of the County Courts Act, 1867 (*t*), draws a distinction as to costs between actions "founded on contract," and actions "founded on tort." These provisions must have occasioned more costs than they have saved.

The practical upshot, if any, of these antiquarian remarks is that the courts of the present day are very free to consider the classification of causes of action without paying much regard to an attempt to classify the now obsolete forms of action, an attempt which was never important or very successful; an attempt which, as we may now think, was foredoomed to failure.

(*r*) 19 & 20 Vict. c. 108, s. 30.
(*s*) 23 & 24 Vict. c. 126, s. 34.
(*t*) 30 & 31 Vict. c. 142, s. 5. Recent decisions are Bryant *v.* Herbert, 3 C. P. D. 189, 389; Pontifex *v.* Midland R. Co. 3 Q. B. D. 23; Fleming *v.* Manchester, &c. R. Co. 4 Q. B. Div. 81.

* APPENDIX B. [* 475]

EMPLOYERS' LIABILITY ACT, 1880.

(43 & 44 Vict. c. 42.)

An Act to extend and regulate the Liability of Employers to make Compensation for Personal Injuries suffered by Workmen in their service.

[7th September 1880.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Where after the commencement of this Act personal injury is caused to a workman

(1.) By reason of any defect in the condition of the ways (*a*), works, machinery, or plant connected with or used in the business of the employer (*b*); or

(2.) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him (*c*) whilst in the exercise of such superintendence (*d*); or

(3.) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman *at the time of the [* 476] injury was bound to conform, and did conform, where such injury resulted from his having so conformed (*e*); or

(4.) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or byelaws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

---

(*a*) An object left sticking out over a way is not a defect in the condition of the way; McGiffin *v.* Palmer's Shipbuilding Company, 10 Q. B. D. 5. "Defect in condition" includes unfitness for safe use, whether from original fault of structure or want of repair; Heske *v.* Samuelson, 12 Q. B. D. 30; or insufficiency of any part of the plant for the particular purpose it is being used for; Cripps *v* Judge, 13 Q. B. Div. 583. As to sufficiency of evidence on this point, Paley *v.* Garnett, 16 Q. B. D. 52. A dangerous or improper collocation of things, not defective in themselves, may be a defect; Weblin *v.* Ballard, 17 Q. B. D. 122; but see Thomas *v.* Quartermaine, *ib.* 414.

(*b*) The words of this section do not apply to ways, works, &c. which are in course of construction, and not yet sufficiently complete to be used in the business; Howe *v.* Finch, 17 Q B. D. 187.

(*c*) See interpretation clause, sect. 8.

(*d*) Osborne *v.* Jackson, 11 Q. B. D. 619.

(*e*) Orders or directions within the meaning of this sub-section need not be express or specific; Milward *v.* Midland R. Co. 14 Q. B. D. 68.

(5.) By reason of the negligence of any person in the service of the employer who has the charge or control (*f*) of any signal, points, locomotive engine, or train upon a railway (*g*),

the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death (*h*), shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work (*i*).

2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases, that is to say,

(1.) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition (*k*).

[* 477] (2.) Under sub-section four of section one, unless the injury * resulted from some impropriety or defect in the rules, byelaws, or instructions therein mentioned; provided that where a rule or byelaw has been approved or has been accepted as a proper rule or byelaw by one of Her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purpose of this Act to be an improper or defective rule or byelaw.

(3.) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence (*l*).

3. The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

4. An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice (*m*) that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: Provided always, that in case of death,

---

(*f*) The duty of oiling and cleaning points is not "charge or control"; Gibbs *v.* G. W. R. Co. 11 Q. B. Div. 22; 12 Q. B. D. 208. Any one having authority to set a line of carriages or trucks in motion, by whatever means, is in charge or control of a train; Cox *v.* G. W. R. Co. 9 Q. B. D. 106.

(*g*) "Railway" has its natural sense, and is not confined to railways made or used by railway companies; Doughty *v.* Firbank, 10 Q. B. D. 358.

(*h*) A workman can bind himself by contract with his employer not to claim compensation under the Act, and such contract is a bar to any claim under Lord Campbell's Act; Griffiths *v.* Dudley, 9 Q. B. D. 357.

(*i*) This evidently means only that the defence of "common employment" shall not be available for the master; not that the facts and circumstances of the workman's employment are not to be considered, *e. g.* if there is a question of contributory negligence.

(*k*) See Kiddle *v.* Lovett, 16 Q. B. D. 605, 610.

(*l*) This sub-section creates a new and special statutory defence, see Weblin *v.* Ballard, 17 Q. B. D. 122, 125.

(*m*) This notice must be in writing; Moyle *v.* Jenkins, 8. Q. B. D. 116, and must contain in writing all the particulars required by sect. 7; Keen *v.* Millwall Dock Co. 8 Q. B. Div. 482.

the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.

5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any person claiming by, under, or through such workman, for * compensation in respect of [* 478] any cause of action arising under this Act, and payment has not previously been made of any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action, such workman, representatives, or person shall not be entitled thereafter to receive any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action.

6.—(1.) Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed (*n*).

(2.) Upon the trial of any such action in a county court before the judge without a jury one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

(3.) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this Act in a county court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied, and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts.

"County court" shall, with respect to Scotland, mean the "Sheriff's Court," and shall, with respect to Ireland, mean the "Civil Bill Court."

In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section nine of the Sheriff Courts (Scotland) Act, 1877.

In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

7. Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury (*o*) and the date at which it was * sustained, and shall [* 479] be served on the employer, or, if there is more than one employer, upon one of such employers.

The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary

(*n*) Proceedings in the county court cannot be stayed under sect. 39 of the County Courts Act, 1856. That section applies only to actions which might have been brought in the Superior Court; Reg. *v.* Judge of City of London Court, 14 Q. B. D. 818; affirmed in C. A., W. N. 1885, p. 95. As to grounds for removal, see Munday *v.* Thames Ironworks Co., 10 Q. B. D. 59.

(*o*) It need not state the cause of action with legal accuracy; Clarkson *v.* Musgrave, 9 Q. B. D. 386; cp. Stone *v.* Hyde, *ib.* 76.

course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

Where the employer is a body of persons corporate or unincorporate the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body.

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy (*p*) therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

8. For the purposes of this Act, unless the context otherwise requires,—

The expression "person who has superintendence entrusted to him" means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour (*q*):

The expression "employer" includes a body of persons corporate or unincorporate:

The expression "workman" means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies (*r*).

[* 480] * 9. This Act shall not come into operation until the first day of January one thousand eight hundred and eighty-one, which date is in this Act referred to as the commencement of this Act.

10. This Act may be cited as the Employers' Liability Act, 1880, and shall continue in force till the thirty-first day of December one thousand eight hundred and eighty-seven, and to the end of the then next Session of Parliament, and no longer, unless Parliament shall otherwise determine, and all actions commenced under this Act before that period shall be continued as if the said Act had not expired.

(*p*) Stone *v.* Hyde, 9 Q. B. D. 76; Carter *v.* Drysdale, 12 Q. B. D. 91.

(*q*) Shaffers *v.* General Steam Navigation Co. 10 Q. B. D. 356; cp. and dist. Osborne *v.* Jackson, 11 Q. B. D. 619. The difference between a foreman who sometimes lends a hand and a workman who sometimes gives directions is in itself, of course, a matter of fact.

(*r*) "Any person [not being a domestic or menial servant] who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour;" 38 & 39 Vict. c. 90, s. 10. This definition does not include an omnibus conductor; Morgan *v.* London General Omnibus Co., 13 Q. B. Div. 832.

APPENDIX C. [481]

STATUTE OF LIMITATIONS.

An Acte for lymytacion of Accions, and for avoyding of Suits in Lawe.

(21 JAMES I. C. 16.)

S. 3. And be it further enacted, that all accions of trespas, *quare clausum fregit*, all accions of trespas, detinue, accion sur trover and replevyn for taking away of goods and cattell, all accions of accompt and uppon the case, other then such accompts as concerne the trade of merchandize betweene marchant and marchant; their factors or servants, all accions of debt grounded upon any lending or contract without specialtie, all actions for arrerages of rents, and all accions of assault and menace battery wounding and imprisonment, or any of them which shalbe sued or brought at any tyme after the end of this present session of parliament shalbe commenced and sued within the tyme and lymytacion hereafter expressed, and not after (that is to saie) the said accions uppon the case (other then for slander,) and the said accions for accompt, and the said accions for trespas debt detinue and replevin for goods or cattell, and the said accion of trespas, *quare clausum fregit*, within three yeares next after the end of this present session of parliament, or within sixe yeares next after the cause of such accions or suite, and not after; and the said accions of trespas of assault and battery wounding imprisonment, or any of them, within one yeare next after the end of this present session of parliament, or within foure yeares next after the cause of such accions or suite, and not after; and the said accions uppon the case for words, within one yeare after the end of this present session of parliament, or within two yeares next after the words spoken and not after. . . .

S. 7. Provided neverthelesse, and be it further enacted, that if any person or persons that is or shalbe intituled to any such accion * of trespas [* 482] detinue accion sur trover replevin accions of accompts accions of debts, accion of trespas for assault menace battery wounding or imprisonment, accions uppon the case for words, bee or shalbe at the tyme of any such cause of accion given or accrued, fallen or come within the age of twentie-one yeares, feme covert, non composs mentis, imprisoned or beyond the seas, that then such person or persons shalbe at libertie to bring the same accions, soe as they take the same within such times as are before lymitted, after their coming to or being of full age, discovert, of sane memory, at large and retorned from beyond the seas, as other persons having no such impediment should have done.

An Act for the Amendment of the Law and the better Advancement of Justice.

(4 & 5 ANNE, C. 3) (*a*).

S. 19. And be it further enacted, by the authority aforesaid, that if any person or persons against whom there is or shall be any such cause of suit or action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue action sur trover or replevin for taking away goods or cattle, or of action of account, or upon the case, or of debt grounded upon any lending or

contract, without specialty of debt for arrearages of rent, or assault, menace, battery, wounding and imprisonment, or any of them, be or shall be at the time of any such cause of suit or action, given or accrued, fallen or come beyond the seas, that then such person or persons, who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person and persons after their return from beyond the seas (so as they take the same after their return from beyond the seas), within such times as are respectively limited for the bringing of the said actions before by this Act, and by the said other Act made in the one and twentieth year of the reign of King James the First.

[* 483] * *An Act to amend the Laws of England and Ireland affecting Trade and Commerce.*

(MERCANTILE LAW AMENDMENT ACT, 1856, 19 & 20 VICT. c. 97, s. 12.)

No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of Her Majesty, shall be deemed to be beyond seas within the meaning of the Act of the fourth and fifth years of the reign of Queen Anne, chapter sixteen (*b*), or of this Act.

(*a*) So in the Statutes of the Realm and Revised Statutes; c. 16 in other editions.

(*b*) This is chap. 3 in the Statutes of the Realm.

*APPENDIX D. [* 484]

CONTRIBUTORY NEGLIGENCE IN ROMAN LAW.

CONTRIBUTORY negligence, and the allied topics considered in the text, did not escape the Roman lawyers, but they are treated only in an incidental manner and no complete theory is worked out. The passages bearing on the point in the Digest "Ad legem Aquiliam" (ix. 2) are the following :—

L. 9 § 4 (Ulpian). Sed si per lusum iaculantibus servus fuerit occisus, Aquiliae locus est : sed si cum alii in campo iacularentur servus per eum locum transierit, Aquilia cessat, quia non debuit per campum iaculatorium iter intempestive facere. Qui tamen data opera in eum iaculatus est, utique Aquilia tenebitur.

It is not clear whether the words "data opera" are intended to cover the case of reckless persistence in the javelin-throwing after the danger to the slave who has put himself in the way is manifest. There can be no doubt however that Ulpian would have considered such conduct equivalent to *dolus*. With this explanation, the result coincides with the English rule.

L. 11, pr. (Ulpian). Item Mela scribit, si, cum pila quidam luderent, vehementius quis pila percussa in tonsoris manus eam deiecerit et sic servi quem tonsor babebat [*al.* radebat] gula sit praecisa adiecto cultello : in quocumque eorum culpa sit, eum lege Aquilia teneri. Proculus in tonsore esse culpam: et sane si ibi tondebat ubi ex consuetudine ludebatur vel ubi transitus frequens erat, est quod ei imputetur: quamvis nec illud male dicatur, si in loco periculoso sellam habenti tonsori se quis commiserit, ipsum de se queri debere.

Mela seems to have thought it a question of fact, to be determined by closer examination of the circumstances, whether the barber, or the player, or both, were in *culpa*. Probably the question he mainly considered was the proper form of action. Proculus held the barber only to be liable. Ulpian agrees that there is negligence in his shaving a customer in a place exposed to the * accident of a stray ball, if the evidence shows that he did so with [* 485] notice of the danger; but he adds that the customer, if he in turn chose to come and be shaved in a dangerous place, has only his own want of care to thank for his hurt. To obtain this result it is assumed that the danger is equally obvious to the barber and the customer; it is likewise expressly assumed, as a condition of imputing *culpa* to either of them, that the game is carried on in an accustomed and convenient place. Given those facts, English law would arrive at the same result in a slightly different form. The players would not be bound to anticipte the rashness of the barber, and the barber, though bound to provide reasonable accommodation for his customers, would not be bound to warn them against an external source of risk as obvious to them as to himself. It would therefore probably be held that there was no evidence of negligence at all as against either the players or the barber. If the game, on the other hand, were not being carried on in a lawful and convenient place, not only the player who struck the ball would be liable, but probably all concerned in the game.

L. 28 (Paulus). Pr. (A man who makes pitfalls in a highway is liable under the lex Aquilia for consequent damage : otherwise if in an accustomed place). § 1. Haec tamen actio ex causa danda est, id est si neque denun taitum est neque

scierit aut providere potuerit: et multa huiusmodi deprehenduntur, quibus summovetur petitor, si evitare periculum poterat.

This comes very near the language of our own authorities.

L. 31 (Paulus). Si putator ex arbore ramum cum deiceret vel machinarius hominem praetereuntem occidit, ita tenetur si is in publicum decidat nec ille proclamavit, ut casus eius evitari possit. Sed Mucius etiam dixit, si in privato idem accidisset, posse de culpa agi: culpam autem esse, quod cum a diligente provideri poterit non esset provisum, aut tum denuntiatum esset cum periculum evitari non possit.

Cp. Blackst. Comm. iv. 192, *supra*, p. 372. Here a person who is hurt in spite of the warning is not necessarily negligent; as if for example he is deaf and cannot hear the warning; but this is immaterial; for the ground of the other not being liable is that he has fulfilled the duty of a prudent man.

The words "vel machinarius" spoil the sentence; they are too much or too little. One would expect "vel machinarius ex aedibus lapidem," or the like. The passage as it stands can hardly be as Paulus wrote it (though it is likely enough to be as Tribonian edited it), and it seems more probable that "vel machinarius" is an interpolation than that other words have been omitted.

[* 486] * Elsewhere Paulus says, Sent. Rec. I. 15 § 3: Ei qui irritatu sou feram bestiam vel quamcunque aliam quadrupedem in se proritaverit, itaque damnum ceperit [so Huschke: *vulg.* "eaque damnum dederit," which does not seem necessarily wrong], neque in eius dominum neque in custodem actio datur.

This is a Case, according to English terminology, not of contributory negligence, but of no evidence of negligence in the defendant, the plaintiff's damage being due wholly to his own act.

INDEX.

*** The *italic* letters refer to foot-notes; thus 438 *s* means note *s* on page 438.

[The paging refers to the [*] pages.]

ABATEMENT:
of nuisance, 341
whether applicable to nuisance by omission, 342
unnecessary damage must be avoided in, 342
ancient process for, 343
difficulty of, no excuse, 348, *sqq.*

ACCIDENT.
inevitable, damage caused by, 115
American law as to, 119, 120, 128
inevitable, cases of, distinguished from those of voluntary risk, 143
liability for, in special cases, 396
non-liability for, in performance of duty, 402
negligence when presumed from, 403

ACT OF GOD: non-liability for, 400

ACT OF PARLIAMENT.
when remedy under exclusive, 168
damage must be within mischief of, 169

ACTION:
forms of, 2, 13, 14
causes of, in contract or tort, 3, 5
on the case, 13, 14
convicted felons and alien enemies cannot have, 47
for injury *per quod servitium amisit*, 55
for wrongs to property, when it survives for or against executors, 56
cause of, under Lord Campbell's Act, 59
against viceroy or colonial governor, 96, 97
right of, for damage in execution of authorized works, 111, 113
cause of, when it arises, 159
single or severable, 165
for breach of statutory duty, 168
against joint wrong-doers, exhausted by judgment against any, 170
when wrong amounts to felony, 173
local or transitory, 179
malicious bringing of, whether it can be a tort, 265
early theory of causes of, 429
on the case, development of, 430
causes of, their modern classification, 431
form of, duty not varied by, 436
concurrent causes of, in contract and tort, 439
concurrent causes of, against different parties, 443
history of forms of, 467
real, when abolished, 2
former writ of right, 13
replaced by action of ejectment, 154 *a.*

ACTS: voluntary, liability for accidental consequences of, 118, 121, 127

[The paging refers to the [*] pages.]

ACTS OF STATE: 94

ADMIRALTY: rule of, where both ships in fault, 385

AGENT:
implied warranty of authority by, 55 *b*.
liability of principal for authorized or ratified acts of, 65
when entitled to indemnity, 171
liability of person assuming authority as, 249
misrepresentations by, 256
false representations made by or through, 257
how far corporation can be liable for deceit of, 258

AGREEMENT: unlawful, cause of action connected with, 153

AIR: no specific right to access of, 336

ALIEN ENEMY: cannot sue, 47

AMENDMENT: of statement of claim, 161 *s*.

AMERICAN LAW:
gives compensation for damage by death, 61
doctrine of a common employment in, 85
employers' liability in, 91
as to judicial acts, corresponds with English, 101
as to inevitable accident being no ground of liability, 119, *sqq*.
on accidents during Sunday travelling, 152
as to causing breach of contract, 455
as to rights of receiver of telegram, 456

ANIMALS:
trespasses by, 149
mischievous, responsibility for, 406

ARBITRATION: how death of party before award affects cause of action, 52

ARBITRATOR: not liable for errors in judgment, 101

ARREST: when justified, 190
And see IMPRISONMENT.

ASPORTATION: 283

ASSAULT:
when not justified by consent, 140
acts for benefit of person who cannot consent, 147
what is, 183
acts not amounting to, 185
words cannot be, 185
justification by consent, 186
self-defence, 147, 187
when action barred by summary process, 188

ASSETS: following property or its value into wrong-doer's, 62

ASSUMPSIT:
action of, its relation to negligence, 354
development of, from general action on the case, 433
implied, where tort waived, 442

AVERAGE: general, law of, 146

BAILEE:
justification of, in re-delivery to bailor, 295
excessive acts of, when conversion, 295
bailment over by, 302

[The paging refers to the [*] pages.]

BALLOON: trespass by, 34, 281

BANKRUPTCY:
no duty to prosecute upon trustee in, 174
debt discharged by, in American law, 179
imputation of, to tradesman, actionable, 213
malicious proceedings in, 266

BARRISTER:
revising, powers of, 99
slander of, 912
And see COUNSEL.

BATTERY: what is, 182
And see ASSAULT.

BREAKING DOORS: when justified, 314

BUILDINGS:
duty of keeping in safe condition, 415
falling into street, 423

BUSINESS:
slander on, injunction to restrain, 166
slander of man in the way of his, 211, *sqq.*
words indirectly causing damage in, 213

CAMPBELL'S ACT (LORD), 9 & 10 Vict. c. 93:
what relatives may recover under 58 *k.*
claim under, does not lie in Admiralty jurisdiction, 58 *m.*
construction of, 59
what damages may be recovered under, 60
cause of action under, not cumulative, 61

CAMPBELL'S ACT (LORD), 6 & 7 Vict. c. 96:
as to pleading apology, &c., in action for defamation, 235

CANAL: escape of water from, 402

CAPACITY: personal, with respect to torts, 46, *sqq.*

CARRIAGE: responsibilities of owner of, 418, 420, 427

CARRIER: common, duty of, 434, 445

CASE: action on the, development of, 430

CATTLE:
trespass by, 282
liability for trespass by, 404
bitten by dog, no *scienter* need be proved, 406, 407
right of owners of, to safe condition of market-place, 419

CAUSE:
immediate or proximate, 26, 28, 36
reasonable and probable, for imprisonment, 192
proximate, in law of negligence, 374, 378, 380
of action. *See* ACTION.

CAUTION: consummate, required with dangerous instrument, 45

CHILDREN: when deprived of remedy by contributory negligence of parent, &c., 382

CIVIL PROCEEDINGS: malicious bringing of, whether a tort, 265

[The paging refers to the [*] pages.]

CLERGYMAN: complaint to, regarding curate, 281

CLUB:
quasi-judicial power of committee, 105
cases on expulsion from, 106 *r*, *s*
chance of being elected to, no legal loss, 209

COLLEGE: quasi-judicial powers of, 105

COLLISON: between ships, 386
And see NEGLIGENCE RAILWAY.

COLONIAL GOVERNMENT: liable for management of public harbour, 52

COLONIAL LEGISLATURE: control of, over its own members, 104 *p*

COLONY: governor of, liable in courts of colony for debt, 97

COMITY: rule of, as to suits affecting foreign sovereigns and states, 97

COMMENT:
fair, not actionable, 220
what is open to, 221

COMMON: no distress by commoners *inter se*, 316

"COMMON EMPLOYMENT:"
the doctrine of, 85
what is, 87
relative rank of servants immaterial, 88
no defence for master under Employers' Liability Act, 476 *i*

COMMONER.
any one can sue for injury, 336
may pull down house on common after notice, 340
may pull down fence without notice, 341

COMMUNICATION: what is privileged, 228

COMPANY:
fraud of directors, 82
removal of directors, 106 *r*
false statements in prospectus of, 241, 250
representations in prospectus of, 253
malicious proceedings to wind up, 266

COMPENSATION: statutory, for damage done by authorized works, 121

COMPETITION: in business or trade, no wrong, 131

CONSENT: effect of, in justifying force, 139, 143
And see LICENCE

CONSEQUENCES:
liability for, 26
near or remote, 27, 32
"natural and probable," 28, 31, 36, 40
liability of wilful wrong-doer for, 31, 43
supposed limitation of liability to "legal and natural," 453

CONSPIRACY: whether a substantive wrong, 267

CONSTABLE:
must produce warrant, 102
is liable for mistake of fact, 103
statutory protection of, 102, 180
powers of, to arrest on suspicion, 190
protection of, in cases of forcible entry, 315

[The paging refers to the [*] pages.]

"CONSUMMATE CARE:"
cannot always avoid accident, 116
requirement of, 122

CONTAGIOUS DISEASE: imputation of, 211

CONTRACT:
actions of, as opposed to tort, 2, 5, 15
right of action upon, not extended by changing form, 47
law of, complicated with that of tort in province of deceit, 237
malicious interference with, 270
effect of, on title to property, 273
overlaps with tort in law of negligence, 353
effect of, on negligence, 362
relations of, to tort, 429, *sqq*
negligence in performing, how far a tort, 434, 437
breach of duty founded on, 436
rights arising from, not affected by suing in case, 437
where action of tort lies notwithstanding existence of doubt as to, 439
implied in law, as alternative of tort, 441
with one party, compatible with actionable breach of duty in same matter by another, 443
breach of, whether third party can sue for an act which is, 446
with servant, effect of, on master's rights, 446
stranger to, cannot sue for damage consequential on mere breach of, 449
breach of, concurring with delict in Roman law, 450
causing breach of, under what conditions a tort, 451
existence or non-existence of, as affecting position of third parties, 461
measure of damages in, as compared with tort, 463
to marry, exceptional features of, 465

CONTRACTOR:
independent, responsibility of occupier for acts and defaults of, 414
independent, duties extending to acts of, 418 *d*, 423

CONTRIBUTION between wrong-doers, 171

CONTRIBUTORY NEGLIGENCE:
plaintiff is not bound to negative, 361
what it is, 374
proper direction to jury, 375, 376
illustrations, 378
of third persons, effect of, 380, 391, *Addenda*
in Roman law, 484
And see NEGLIGENCE.

CONVERSION:
what is, 288
distinguisbed from injnry to reversionary interest, 289
meaning of, extended, 289
acts in good faith may be, 290
refusal as evidence of, 291
mere claim of title or collateral breach of contract is not, 292
qu. as to dealings under apparent authority, 293, 294
by bailees, 295
distinction between varieties of, and cases of injury without conversion, 298

CONVICT cannot sue, 47

COPYRIGHT: principle of slander of title extended to, 261

[The paging refers to the [*] pages.]

CORPORATION :
liability of, for wrongs, 51
responsibility for performance of public duties, 51
liable for trespass, 51 *p*
may be liable for fraud, &c. of its agents, 81, 83
liability of, for fraud of agent, 258
cannot commit maintenance, *semble*, 271 *d*

COSTS :
relation of, to damages, 158 *l*
presumed to be indemnity to successful defendant, 265.

COUNSEL : immunity of words spoken by, 225

COUNTY COURT : statutory distinction of actions in, 437

COUNTY COURT JUDGE : powers of, 99

COURT,
privilege of statements made in, 225
control of, over jury, 235

COURT AND JURY :
functions of, in cases of negligence, 364, 365
usual and proper direction as to contributory negligence, 375

COURT-MARTIAL :
protection of members of, 100
whether action lies for bringing one before, without probable cause, 103

CRIME : oral imputation of, when actionable, 209

CRIMINAL CONVERSATION : former action of, 196

CRIMINAL LAW :
attempted personal offences, 29 *m*
what is immediate cause of death in, 36
individuals bound to enforce, 101
forfeiture of deodand, 117
as to self-defence, 148
conversion necessary for larceny, 288
distinction of receiving from theft in, 303
as to asportation, 314
prosecution for public nuisance, 324, *sqq.*

CRITICISM : limits of allowable, 220, 222

CULPA.
equivalence of *culpa lata* to *dolus*, 247, 250, 357
licensor not liable to gratuitous licensee for, 426

CUSTODY distinguished from possession, 277

CUSTOM : loss of, no right of action for, 134

CUSTOM OF THE REALM, meaning of, 435, 438

CUSTOMER : right of, to safe condition of buildings, &c., 417

DAMAGE :
relation of, to wrongful act, 19
unavoidable, no action for, 111
effect of, as regards limitation, 180
special in law of slander, what, 207

[The paging refers to the [*] pages.]

DAMAGE—*continued.*
actual, unnecessary to constitute trespass, 280
particular, in action for public nuisance, 326
not when private right infringed, 336
special, procuring breach of contract actionable only with, 451
remoteness of, 453.

DAMAGES:
measure of, 27
nominal, ordinary, or exemplary, 157
carrying costs, 158 *l*
nominal, as test of absolute right, 159
when damage gist of action, 159
ordinary, measure of, 161
exemplary, 162
mitigated, 164
only once given for same cause of action, 165
for false representation, 167
in actions for seduction, 200
mitigation of, by apology, in action for slander or libel, 235
in action for trover, 292
relation of costs to, 322
for nuisance, 343
to what date assessed, 344
measure of, in contract and tort, 463
for breach of promise of marriage, 465

DAMNUM SINE INIURIA, 22, 130

DANGER:
going to, 144
imminent, duty of person repelling, 149
position of, one knowing, 152
diligence proportioned to, 372
concealed, to bare licensee, 425
licensor liable for, 426

DANGEROUS THINGS: strict responsibility in dealing with, 394, 396, 407, 409, 413

DEATH:
of party, effect of, on rights of action, 52
of human being, said to be never cause of action at common law, 54

DECEIT:
action of, damage must be shown, 160
may give innocent agent claim for indemnity, 171 *e*.
what, 236
conditions of right to sue for, 239
must include falsehood in fact, 241
may include misstatement of law, 242
by garbling, 243
statement believed by maker at the time is not, 243
effect of subsequent discovery of truth, 244
reckless assertion, 245
breach of special duty, 246
intention as element of, 248
by public representations, 249
statement not relied on is not, 251

[The paging refers to the [*] pages.]

DECEIT—*continued.*
effect of plaintiff's means of knowledge, 252
effect of misrepresentation by or through agent, 256—260
action of, against falsifier of telegram, 456 *sqq.*

DEFAMATION:
damages in action of, 158
special damage, 160
gross, damages for, 163
in general, 204
spiritual, 210 *s.*
of one in his business, 211
in what sense "malicious," 214
"publication" of, 215
construction of words as to defamatory meaning, 216
by repetition, 218
exception of fair comment, 219
justified by truth of matter, 223
immunity of speech in Parliament, 225
words used by judges and others in judicial proceedings, 225
naval and military, judicial or official proceedings, 226
privileged communications generally, 227
exception of "express malice," 228
what are privileged occasions, 229
privilege of fair reports, 231
newspaper reports of public meetings, 233
And see LIBEL, SLANDER.

DEFECT:
latent, non-responsibility for, 419
in structure, responsibility of occupier for, 422

DELICTS:
Roman law of, 16-18
terminology of, Austin on, 18 *s.*

DETINUE: 13, 15
nature of writ of, 284

DIGEST: of Justinian, *ad legem Aquiliam*, 17, 484

DILIGENCE:
liability even when utmost, used, 11
amount of, required by law, 25
general standard of, 353, 357
includes competent skill where required, 358, 362
due, varies as apparent risk, 372

DISABILITY: suspending statute of limitation, 180

DISCRETION: where given by legislature must be exercised with regard to other rights, 113

DISTRESS:
in general. 315
damage feasant, 315
conditions of, 316
for rent, how limited, 320 *p*
liability for, 321
excess in distress damage feasant, effect of, 321

[The paging refers to the [*] pages.]

DOCKS: owner of, answerable for safety of appliances, 417

DOG:

whether owner liable for mere trespass of, 406
liability for vice of, 406

DOG-SPEARS: authorities on injuries by, 149

DOLUS, 17, 53, 236

DOMINUS PRO TEMPORE, 70

DRIVER: duty of, 145.

DRIVERS: negligence of both, 380

DRUNKEN MAN: authorized restraint of, 108

DUEL: always unlawful, 140

DUTIES:

absolute, imposed by policy of law, 7, 19
relation of legal to moral, 9, 11
to one's neighbour, expanded in law of torts, 12

DUTY:

to one's neighbour, nowhere broadly stated, 21
specific legal acts in breach of, 23
of respecting property, 24
of diligence, 24
statutory, remedy for breach of, 168
breach of, in course of employment, action for, 434

EASEMENT:

disturbance of, analogous to trespass, 304
of light, 337

ELECTION:

to sue in contract or tort for misfeasance, 434
doctrine of, seems not applicable when duties are distinct in substance, 448

EMPLOYER: when answerable as master, 69, 70

EMPLOYERS' LIABILITY ACT, 84, 89

text of, 475, *sqq.*

EMPLOYMENT:

what is course of, 74
public, of carriers and innkeepers, 434

ENTRY:

when justified, 310
fresh, on trespasser, 312
to take distress, 316
of necessity, 317

EQUITY:

remedies formerly peculiar to, 154
former concurrent jurisdiction of, in cases of deceit, 167

ERROR: clerical, responsibility for, 213, 248, 459

[The paging refers to the [*] pages.]

EVIDENCE:
of malice, 234
or conversion, 291
of negligence, 359
question whether there is *any* for court: inference from admitted evidence for jury, 366
of contributory negligence, 376

EXECUTION: of process, justification of trespass in, 314

EXECUTORS:
statutory rights of action by, for wrongs to testator's property, 56
liability of, for wrongs of testator, 57
to restore property or its value, 62
cannot sue for personal injuries to testator, even on a contract, 465

EXPLOSIVES:
liability for improper dealing with, 120 *c*, 409
liability for sending without notice, 410

FACTORS ACTS:
validity of dealings under, 274
good title acquired under, 461

FACULTIES: ordinary use of, presumed, 372

FALSE IMPRISONMENT:
what is, 188
distinguished from malicious prosecution, 191
prosecutor or officer answerable for, 191

FELONY:
"merger" of trespass in, 172
arrest for, on what terms, 190
imputation of, when libellous, 211, 224

FENCE:
when trespass for defective, 316
falling in neighbor's land, 400

FERRY:
refusal to carry passengers by, 291
franchise of, 304 *h*
nuisance to, 339

FINE: in trespass under old law, 3

FIRE:
as justification for trespass, 317, *sqq*
negligence as to, 357
escape of, from railway engines, 369
safe keeping of, 407
responsibility for carrying, 408

FIRE-ARMS:
accidents with, 122, 124
consummate caution required in dealing with, 409

FOOTPATH: diversion of, duty to warn, 421

FORCIBLE ENTRY:
statutes against, 309
with good title, whether civilly wrongful, 311

[The paging refers to the [*] pages.]

FOX-HUNTING : trespass in, not justified, 319

FRANCE (law of):
Conseil d'Etat inquires into "acts of state," 98
rule of, of five years' prescription, 178

FRANCHISE : malicious interference with exercise of, 270

FRAUD :
of agent or servant, 81
of partners, 83
compensation for, in equity, formerly by way of restitution, 167
concealed, effect of, on period of limitation, 181
equitable jurisdiction founded on, 238
"legal," 239
of agents, 239
relation of, to infringement of trade-marks, &c., 263
effect of, on transfer of property or possession, 273

FROST : damage brought about by extraordinary, 41

GAS : escape of, 411

GOODWILL : protection of privileges analogous to, 262

GOVERNOR : colonial, actions against, 97

GRANT :
distinguished from licence, 306
but may be inseparably connected with licence, 307

GUARANTY: misrepresentations amounting to, 254

GUEST : gratuitous, is mere licensee in law, 426

HIGHWAY:
justification for deviating from, 317
nuisances by obstruction of, 325, 326, 327, 328, 330
cattle straying off, 405
traction engine on, 408
rights of persons using, to safe condition of adjacent property, 420, 422

HORSE :
injuries caused by, 40
trespass by, 405

HUSBAND AND WIFE :
actions by and against, 49
action of personal tort between, does not lie, 50
husband may not now beat wife, 107 *a*
action for taking or enticing away wife , 195, 198
assault or *crim. con.*, 196
libel on husband by letter to wife, 216

"IDENTIFICATION:"
doctrine of, in cases of negligence, 380—384
of child with grandmother, 384
of man with land, 385
the doctrine now overruled in C. A., *Addenda*

IMPRISONMENT, FALSE:
damages for, 162
justified by local act of idemnity, 175

[The paging refers to the [*] pages.]

IMPRISONMENT, FALSE—*continued.*
definition of, 189
on mistaken charge, followed by remand, 192
what is reasonable cause for, 193

INCORPOREAL RIGHTS of property, violation of, 304

INDEMNITY:
claim to, of agent who has acted in good faith, 171
colonial Act of, 175

"INDEPENDENT CONTRACTOR:" 64, 66, 69

INDIA, BRITISH:
dealings of East India Company with native states, 95
protection of executive and judicial officers in, 103 *l*, 104

INFANT:
cannot be made liable on contract by changing form of action, 47
liability of, for torts, 47
liable for substantive wrong though occasioned by contract, 48
cannot take advantage of his own fraud, 48
whether liability limited to wrongs *contra pacem*, 50
not made liable on contract by suing in form of tort, 436

INJUNCTION:
jurisdiction to grant, 166
interlocutory, 166, 167
to restrain continuing trespass, 323
to restrain nuisance, 344
on what principles granted, 345
not refused on ground of difficulty of removing nuisance, 348
under C. L. P. Acts, 154 *b*

INNKEEPER:
selling goods of guest, 297 *g*
cannot dispute entry of guest, 319
duty of, 434

INNS OF COURT: quasi-judicial powers of, 105

INNUENDO: meaning and necessity of, 217

INSTRUMENT, DANGEROUS: responsibility of person using, 45, 394, 407

INSURANCE:
effect of, on necessity of salvage work, 146 *a*
duty in nature of, as regards land, 398
not as regards persons, 404

INTENTION:
not material in trespass, 9, 12
general relation of, to liability, 29
inference or presumption of, 31

INVITATION: rights of person coming on another's property by, 415, *sqq*

"INVITATION TO ALIGHT" cases, 368

IRELAND: lord lieutenant exempt from actions in, for official acts, 97

JUDGE:
protection of, in exercise of office, 99
of inferior court must show jurisdiction, 99

[The paging refers to the [*] pages.]

JUDGE—*continued.*
not liable for latent want of jurisdiction, 100
allegation of malice will not support action against, 100
must grant *habeas corpus* even in vacation, 100
cannot refuse to seal bill of exceptions, 100

JUDGMENT: against one of several wrong-doers, effect of, 170

JUDICIAL ACTS:
distinguished from ministerial, 191
protection of, 225

JUDICIAL PROCEEDINGS: reports of, 232

JUDICIUM RUSTICUM, 386

JURISDICTION:
to grant injunctions, 166
local limits of, 175

JURY. *See* COURT AND JURY

JUS TERTII: cannot justify trespass or conversion, 300

JUSTICE OF THE PEACE:
limitation of actions against, 180
memorial as to conduct of, 230 *h*

JUSTIFICATION AND EXCUSE:
general grounds of, 93, *sqq*
of defamatory statement by truth, 223
by licence, 305
by authority of law, 309
for re-entry on land. 310
for retaking goods, 313
under legal process, 314
for taking distress, 315
determination of, 320

LABOURERS, STATUTE OF: action under, 197, 202

LAND:
acts done in natural user of, not wrongful, 132
artificial works on, 133 *p*

LANDLORD AND TENANT:
questions of waste between, 288
which liable for nuisances, 350

LANDOWNERS:
duty of, as to escape of dangerous or noxious things, 396, 399
adjacent, duties of, 424

LARCENY: when trespass becomes, 313

LAW: misrepresentation of, 242

LEAVE AND LICENCE:
defence of, 138, *sqq.*
as justification for assault, 186
And see LICENCE

LESSEE: for years holding over no trespasser, 319

LESSOR: must not forget lease, 247

[The paging refers to the [*] pages.]

LEX AQUILIA:
rules of liability under, compared with English law, 118 *a*
Digest on, compared with English law, 165 *k*
Roman law of, liability under, 450, 484

LEX FORI: regard to, in English courts, 175, 176

LIBEL:
injunction to restrain publication of, 166
what is *prima facie* libellous, 207
what is publication, 215
construction of, 216
fair comment is not, 220
And see DEFAMATION

LICENCE:
to apply bodily force, 139
to do bodily harm, good only with just cause, 140
obtained by fraud, void, 142
what, 305
revocable unless coupled with interest, 307
may become irrevocable by matter subsequent, *Add*
may be annexed by law to grant, 307
how given or revoked, 308
not assignable, 308
does not confer rights *in rem*, 308

LICENSEE:
rights of, in use of way, 421
what risks he must take, 425

LIEN: distinguished from conversion, 296

LIGHT:
obstruction of, 339
nature of the right to, 337
what amounts to disturbance of, 337
the supposed rule as to angle of 45°, 338
effect of altering or enlarging windows, 338

LIMITATION:
statute of, 47, 179
effect of foreign law of, 178
exception of concealed fraud, 181

LOCALITY: of wrongful acts, when material, 175

LUNATIC: authorized restraint of, 108

MAINTENANCE: actions for, 271

MALA PROHIBITA: no longer different in result from *mala in se*, 23

MALICE: ambiguity of the word, 136 *u*.
effect of, an exercise of common right, 137
"implied," meaning of, 214
express, in communication on privileged occasions, 228
evidence of, 234
essential in slander of title, 260
procuring breach of contract actionable only with, 453

"MALICE IN FACT:" 51, 228, 234

MALICIOUS INJURIES: by interference with lawful occupation, &c., 269

[The paging refers to the [*] pages.]

MALICIOUS PROSECUTION:
distinguished from false imprisonment, 191
whether action for, lies against corporation, 264

MANDAMUS: 154 *b*

MARKET: franchise of, 305 *h*

MARKET OVERT: title acquired in, 274, 461

MARKET-PLACE: duty of person controlling structures, in, 418, 419

MARRIAGE: breach of promise of, 164, 165

MARRIED WOMAN:
damages and costs recovered against, how payable, 49
can now sue and be sued alone, 49
whether liability at common law limited to wrongs *contra pacem*, 50

MARRIED WOMEN'S PROPERTY ACT:
effect of, 4
right of action under, how limited, 49 *i*

MASTER AND SERVANT:
master responsible for servant's negligence, 20
whether master can have action for loss of service when servant is killed by the injury, 55
liability of master for acts and defaults of servant, 63, *sqq*
rule as to liability of master, 66
reason of, 67.
temporary transfer of service, 71
execution of specific orders, 72
liability of master for servant's excessive acts, 77
wilful wrongs, 80
fraud, 81
forgery, 82 *l*
injuries to servant by fellow-servant, 84
master must choose proper servants, 88
furnish suitable materials, 88
defence of servant by master, 148 *d*
action for beating servant, 196, 201
enticing away, 197
doctrine of constructive service, 201
menacing servants, 202
master giving character, 229
warning by master to fellow-servants privileged, 230
as passengers by railway, 440
whether master can sue for loss of service by a breach of contract with servant, 446
And see SERVANT.

MAXIMS:
imperitia culpae adnumeratur, 25
in iure non remota causa sed proxima spectatur, 26
a man is presumed to intend the natural consequences of his acts, 30
actio personalis moritur cum persona, 52, *sqq*
qui facit per alium facit per se, 67
respondeat superior, 67
sic utere tuo ut alienum non laedas, 93, 109
nullus videtur dolo facere qui suo iure utitur, 110 *c*
volenti non fit iniuria, 138, 142

[The paging refers to the [*] pages.]

MAXIMS—*continued.*
culpa lata dolo aequiparatur, 238
adversus extraneos vitiosa possessio prodesse solet, 300
res ipsa loquitur, 423

MEETING: public, newspaper reports of, 233

MENACE:
when actionable, 187
to servant, 202

MILITARY COURT: privilege of, 226

MINISTER: of Baptist chapel, removal of, 106 *s*

MISREPRESENTATION:
of fact or law, 242
by omission, 243
by reckless assertion, 245
by breach of special duty of disclosure, *qu.* whether deceit, 246
by neglect of special duty, 247, 248
reliance of plaintiff on defendant, 251
construction of ambiguous statement, 254
amounting to promise of guaranty, 237, 254
See DECEIT.

MISTAKE:
does not excuse interference with property, 10
of sheriff, in taking goods, 314.

MORTGAGOR:
may be guilty of conversion, 297
cannot oust mortgagee in possession, 310

MOTIVE:
whether material in exercise of rights, 135, 137
considered in aggravation or reduction of damages, 164
when material part of cause of action, 454.

NAME:
no exclusive right to use of, 138
of house, no exclusive right to, 263

NATURAL JUSTICE: must be observed in exercise of quasi-judicial powers, 105

"NATURAL USER." of property, non-liability for, 397

NAVIGATION:
negligence in, 39
requirements of, as limiting statutory powers, 112

NECESSITY:
as excuse for unskilled person, 25
as justification generally, 146
"compulsive," 149
trespasses justified by, 156, 317

NEGLIGENCE,
liability for, 10
equivalent to *culpa*, 17
liability for, depends on probability of consequence, 36
contributory, 125 *t.*
question of, excluded when a risk is voluntarily taken, 145

[The paging refers to the [*] pages.]

NEGLIGENCE—*continued.*
aggravated by recklessness, 163
as ground of action against servant for conversion, 295
general notion of, 352
concurrence of liability *ex contractu* and *ex delicto*, 353
Alderson's definition of, 355
failure in average prudence is, 357
evidence of, 359
burden of proof on plaintiff, 360
how affected by contract, 362
when presumed, 363
principles illustrated by railway cases, 364
And see RAILWAY.
duties of judge and jury, 365
And see CONTRIBUTORY NEGLIGENCE.
of independent persons may be joint wrong, 381, *Addenda.*
one is not bound to anticipate another's, 387
choice of risks caused by another's, 388
presumption of, in cases of unexplained accident, 422
liability for, concurrent with another party's liability on contract, 443
general doctrine of, not applicable to statements, 457, 459

NEWSPAPER:
vender of, not liable for libel, 215
volunteered reports to, 232
Libel and Registration Act, 1881 . 233
special procedure in action for libel, 235

NEW TRIAL: for excessive or inadequate damages, 157
And see COURT AND JURY.

NOTICE:
effect of, on liability for negligence, 356
judicial, of common facts, 363
of special risks, 372
of special circumstances, as affecting measure of damages, 464

NUISANCE:
when justified by statutory authority, 113, 115
public or private, 324
particular damage from public, 325
private, 328
affecting ownership, 329
easements, 330
comfort and enjoyment, 330
what amount of injury amounts to, 331
doctrine of "coming to nuisance" abrogated, 332, *Add.*
acts in themselves useful and in convenient places may be, 333
miscellaneous forms of, 334
by use of property for unusual purpose, 335
by injury common to many persons, 336
by obstruction of light, 336
And see LIGHT.
to market or ferry, 339
remedies for, 340
abatement of, 340
notice before abatement, when required, 341
duties of person abating, 342
damages, 343
injunction, 344

[The paging refers to the [*] pages.]

NUISANCE—*continued.*
when reversioner can sue for, 349
when occupier or landlord liable for, 350
when vendor or purchaser liable, 321
whether a single accident can be, 398

OBLIGATION:
ex delicto in Roman law, 16
quasi ex delicto, 18

OFFICE: judicial or ministerial, 106

OFFICERS:
public, acts of, 101
excess of authority by, 102
naval and military, acts of, 103
subordinate, to what extent protected, 103
commanding, liability of, for accident, 122
liability of, for malicious misconduct, 271

OMISSION: of legal duty, liability for, 23.

PARENT: authority of, 107

PARLIAMENT:
disciplinary orders of House of Commons not examinable, 104
may give a governing body absolute powers, 106
position of presiding and returning officers at election for, 107
protection of words spoken in, 225
proceedings of Committee, 226
publication of papers and proceedings, 231
fair reports of debates in, 232
wisdom of, 233 *s. t.*

PARTNER:
liability of, for co-partner's fraud, 83
to servant of firm, 89
expulsion of, 106

PASSENGER: rights of person accepted as, 440, 441, 444

PATENT RIGHTS:
principle of slander of title extended to, 261
relation of, to possession, 305

PERCOLATION: underground, no cause of action for, 132, *sqq.*

PERSON: wrongs to the, 7. *See* ASSAULT.

PERSONAL ESTATE: damaged by personal injury, no cause of action, 57

PIGS:
may be cattle by statute, 384 *u.*
average obstinacy of, 384 *v.*

PLAINTIFF: a wrong-doer, may still recover, 151

PLEDGEE: abuse of authority by, when conversion, 296

POISON: responsibility of person dealing with, 411

POSSESSION:
more regarded than ownership in the early law, 275
right to, commonly called property, 276, 277
distinguished from custody, 277

[The paging refers to the [*] pages.]

POSSESSION—*continued.*
relation of trespass to, 278
constructive, 279 *j.*
right to immediate, plaintiff in trover must have, 289
without title, protected against strangers, 299
why protected by law, 301
derivative, 302
of receiver or taker from trespasser, 303
restitution of, after forcible entry, 311
taken by trespass, when complete, 312
owner not in, how far liable, 427
obtaining of, by trick, 461

POST-CARD: sending defamatory matter on, 233

POUND: conditions of, 317

PRESCRIPTION ACT: effect of, on right to light, 337

PRINCIPAL AND AGENT:
when principal must indemnify agent, 171
liability of principal for fraud of agent, 257
where principal is a corporation, 258
reason of liability, 259
liability of agent misrepresenting principal's authority, 442

PRINTING OF LIBEL: *prima facie* a publication, 215 *k.*

PRISON: what is, 189

PRIVILEGE:
"absolute," in law of defamation, 226
"qualified," 227
privileged occasions, and excess, 228, 233
fair reports, 231

PRIZE-FIGHT:
why unlawful, 139, 141
presence at, 141

PROPERTY:
wrongs to, 7, 9, 12, 15
acts done in defence of, 148
duty to respect, 272
of goods, commonly means right to process, 277, 289
transferred by satisfied judgment in trover, 292

PROSECUTION: whether necessary before offender can be civilly sued, 172, *sqq.*

PUBLICATION:
of libel, what, 215
by agent, 216

PURCHASER: innocent, may be liable for conversion, 293, 294

RAILWAY:
unguarded crossing, responsibility of company for, 23, 38
remoteness of damage suffered on, 35, 41
overcrowded carriage in, 41
liability of company for mistaken acts of servants, 77
immunity or liability of company for damage in execution of undertaking, 111, 113

[The paging refers to the [*] pages.]

RAILWAY—*continued.*
effect of statement in company's time-tables, 250
distraint of engine damage feasant, 315 *x.*
evidence of negligence in accidents on, 364
level crossing cases, 367
"invitation to alight" cases, 368, 390
escape of sparks, 369
where train fails to stop, 390
liability of company for damage by escape of sparks, 403, 408
breaking down of embankment, 403
duty of company as to safety of carriages and platforms, 418
of structures, as regards passers-by, 422
liabilities of company from assumption of duty, independent of contract, 440, 444

RATS: damage by, 402 *z.*

REASONABLE CAUSE: for imprisonment, 193

RECAPTION: of goods wrongfully taken, 313, 321

REMEDIES:
at common law in general, 154
self-help, 155
damages, 156
kinds of damages, 157
measure of damages, 161
injunctions, 165
damages or compensation for deceit, 167
for breach of statutory duty, 168
alternative, on one cause of action, 432

REMOTENESS: of consequence or damage, 35, 41

REPLEVIN, 276, 284

REPORTS:
of naval and military officers, how far privileged, 226
confidential, to official superiors, 229
fair, of public proceedings, 231, 232
newspaper, of public meetings, 233

REPRESENTATION: compensation or damages for false, 167

RES IUDICATA, 170

REVENUE OFFICERS: protection of, in cases of forcible entry, 315

REVERSION: injury to, measure of damages, 161, 283

REVOCATION: of licence, 306, 308, *Add.*

RIGHT:
exercise of, not cause of action, 129
whether it can be made wrongful by malice in fact, 136
absolute, at least nominal damages recoverable for violation of, 159

RISK: voluntary taking of, 125 *t*, 128, 143, 144, 145

ROMAN LAW:
of obligations *ex delicto*, 8, 16
as to effect of death of party on rights of action, 53
on the value of human life, 56 *d.*
noxal actions of, 117
does not make a man liable for inevitable accidents, 118

[The paging refers to the [*] pages.]

ROMAN LAW—*continued.*
distinguishes right to personal security from that of property, 165
of possession, 278, 301 *t, u.*
legis actiones in, compared with common-law forms of action, 431
theory of *culpa* in, 433 *f.*
concurrent breach of contract with delict in, 450
of contributory negligence, 484

RUNNING-DOWN CASES, 126, 127

RYLANDS v. *FLETCHER*, the rule in, 394, *sqq.*

SCANDALUM MAGNATUM, 205

SCIENTER: doctrine of, as to damage by animals, 406

SCOTLAND (law of):
gives compensation for damage by death, 58, 61
theory of "common employment" forced upon, 85
as to *acmulatio vicini*, 137

SEDUCTION:
actions for, 195
what is service for this purpose, 199, 200
damages, 200

SELF-DEFENCE:
right of, 147
injuries to third person resulting from, 149, 150
against wrongful assault, 187

SELF-HELP, 155. *And see* ABATEMENT, DISTRESS, RECAPTION.

SEPARATE PROPERTY:
costs and damages payable out of, 49
trespasser on, 50
whether husband can be indemnified from, 50

SERVANT:
who is, 69
may change master *pro tempore*, 71
what is course of service, 73
negligence of, in conduct of master's business, 73.
departure from master's business, 74
mistake or excess of authority by, 77
arrest of supposed offender by, 78
acts of, outside his authority, 79
wilful wrongs of, for master's purposes, 80
injuries to, by fellow-servant, 84
injury to, where master interferes in person, 89
custody or possession of, 277
conversion by, in master's interest, not excusable, 290
but *qu.* as to acts done under master's possession and apparent ownership, 294
And see MASTER AND SERVANT.

SERVICE:
proved or presumed in action for seduction, 198, *sqq.*
of young child, 200

[The paging refers to the [*] pages.]

SHERIFF:
immunity or liability of, 108
power and duty of, to break doors, &c. in execution of process, 314
remaining unduly long in possession, 320

SHIP:
master's authority, 108
right of shipowner to refuse services of particular tug, 134
owner's liability, how affected by neglect of statutory regulations, 169
contributory negligence of, 379, 387
rule of Admiralty as to division of damage, 386
duty of owner as to safety of cargo, 419
liability of owner as carrier, 438 *s.*

SHOOTING: liability for accident in, 122, *sqq.*

SKILL: requirement of, in particular undertakings, 25, 358, 362

SLANDER:
injunction to restrain, 166
when actionable, 206
special damage, 207
temporal loss necessary to special damage, 208
imputation of crime, 209
contagious disease, 211
disparagement in office or business, 211
indirect damage in business, 213
And see DEFAMATION.

SLANDER OF TITLE, 132, 260
relation of, to ordinary defamation, 261

SOVEREIGN: foreign, cannot be sued in England for political acts, 97

SOVEREIGNTY: acts of, how far examinable, 98

SPORT: hurt received in lawful, 140, 143, 186

SPRING-GUNS:
authorities on injuries by, 144, 151
threat of useless, 232 *g*, *Addenda.*

STAIRCASE: when not dangerous, 364, 371

STAND: safety of, guaranteed by contractor, 418

STATE: acts of, 94

STATUTE:
duties created by, breach of, 23, 24, 168
acts authorized by, 111
caution required in exercise of powers conferred by, 112

STRANGER: has no cause of action on breach of contract, 456

SUNDAY: statutes for observance of, in United States, 152

SURGEON: action against, for misfeasance, 433 *d.*

TELEGRAPH:
sending defamatory matter by, 234
conflict between English and American authorities as to rights of receiver of message, 456

[The paging refers to the [*] pages.]

TENANTS:
intimidation of, 202, 203 *d.*
in common, trespass between, 298

TENTERDEN'S ACT (LORD), 255
qu. how far now operative, 256

THIRD PERSON: intervention of, no excuse for negligence, 44

TIMBER: waste by cutting, 287

TORT:
what is, 1
actions of (as opposed to contract), 2
wrongs which are not, 3
former criminal character of action for, 3
an exclusively common-law term, 3, 4
generic division of, 6
wilful, negligent, or involuntary, 9
from ethical standpoint, 12
general characters of, 19
law of, in three main heads, 22
relations of, to contract 429, *sqq.*
cases of, whether contract or no contract between the same parties, 439
waiver of, for purpose of suing in contract, 441
cause of action in, co-existing with contract, 433
or contract, statutory division of actions as "founded on," 474

TRADE-MARKS: protection of, 264

TRAMWAY: nuisance by, 325

TRAP
dangers in nature of, 421, 425, 426, 427
set by railway company, 444

TREE: projecting over neighbour's land, 499, 400

TRESPASS:
the least invasion of property is, 9
writ of, 13
liability for consequences of, 34
inevitable accident as excuse for, 117, *sqq.*
strict archaic theory of, 123
special justification, when proper, 127
injuries to, when actionable, or not, 144, 150
necessity as excuse for, 146
damages in action of, 158, 163
actul damage not material in, 159
wanton, 162
aggravated, 162, 163
"merged in felony," 173
to foreign land not actionable, 177
by taking away wife, &c., 195
or case, whether action for seduction in, 196 *b*, 197 *d.*
relation of, to larceny, 277, 283, 288
to land or goods, what, 278
relation of, to conversion, 279, 288
to land, by what acts committed, 280
above or under ground, 281
by cattle, 282
to goods, how committed, 283

[The paging refers to the [*] pages.]

TRESPASS—*continued.*
between tenants in common, 298
owner entitled to immediate possession may sue for, 301
justification or excuse for, 305, *sqq.*
continuing, 313
by necessity, 318
in fox-hunting, 319
ab initio, 319
ab initio cannot arise from nonfeasance, 321
costs in action for, 322
continuing, restrainable by injunction, 323
distinguished from nuisance, 329, *sqq.*
by cattle, 404
action of, originally penal, 472

TRESPASSER:
not disqualified to sue, 151
effect of delivery by, 302

TROVER:
action of, 285
special action in some cases where trover does not lie, 296, 227

"TRUE OWNER:" meaning of, 275

TRUSTEE: must not forget incumbrances, 247

TRUTH: as justification, 223

UNIVERSITY: quasi-judicial powers of, 105

USER: reasonable presumption of, 286

VEHICLE: safety of, how far guaranteed by owner, 418

VENUE: old law of, 176

VICEROY: local actions against, 96

VI ET ARMIS: what trespass is, 140

VOLUNTEER: in no better plight than servant, 89

WARRANTY:
obligation of, on sale for specific purposes, 419 *l.*
implied, of agent's authority, 442

WASTE:
remedies for, 284
what is, 285
reasonable user of tenement is not, 286
by cutting timber, &c., 287
equitable, 287
as between landlord and tenant, 288

WATER:
under land, rights of using, 132
responsibility of persons artificially collecting, 394
except where storage is a duty, 402

WAY: limited right of, 317 *g.*

WINDOWS: alteration in, does not destroy claim to light, 338, *sqq.*

WITNESS: immunity of words spoken by, 225

[The paging refers to the [*] pages.]

WORDS:
cannot be assault, 185
alleged defamatory construction of, 217
repetition of, 215, 218

WORKMAN: who is, within Employers' Liability Act, 479

WRIT:
of right, 13 *l.*
of debt, 13
of detinue, 13, 15
of trespass, 13, *m.*
of trespass on the case, 14, 23

WRONG-DOER: not necessarily disentitled to sue for wrong to himself, 151

WRONG-DOERS:
do not forfeit rights of action, 151
joint liability of, 170
contribution between, 171

WRONGS:
to the person, 7
to property, 7
to person and property, 7. *See* TORT.

THE END.